No. 2598

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

HERBERT L. ENNIS and GUY W. ENNIS,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

R. O. LUNKE, Esq., of Culbertson, Montana, and Messrs. WALSH & NOLAN, of Helena, Montana,

Attorneys for Plaintiffs and Defendants in Error.

Messrs. VEAZEY & VEAZEY, of Great Falls, Montana,

Attorneys for Defendant and Plaintiff in Error. [1*]

In the District Court of the United States, in and for the District of Montana.

No. 960.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

BE IT REMEMBERED, that on Aug. 12, 1911, the amended complaint of plaintiffs was filed herein, being in the words and figures following, to wit: [2]

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*Page-number appearing at foot of page of original certified Record.

In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Valley.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY a Corporation, and JOHN HAMILTON,
Defendants.

Amended Complaint.

The above-named plaintiffs, first having obtained leave to do so, file this their amended complaint, and for cause of action against defendants allege:

I.

That at all of the times hereinafter mentioned the defendant Great Northern Railway Company, was, and is, a corporation organized and existing under the laws of the State of Minnesota, and at all of said times owned and operated a line of railway running across the State of Montana and across Valley County, in said State, and at all of said times owned, in connection with said railway company, what is known as a right of way, which right of way, at the places hereinafter referred to, where the runaway occurred, embraced a strip of ground about seventy-five feet on each side of the track and running parallel to the track.

II.

That on the 18th day of April, 1909, and for a long time prior thereto, the defendant, John Hamilton,

was in the employ of the defendant company as section foreman, and as such section foreman had supervision and control of that portion of the railway and right of way of the defendant company, more particularly described as follows: That portion of said railway and right of way [3] between sections one and two, township twenty-seven north, range fifty-eight east, Montana Meridian, in Valley County, and as such section foreman it become, and was, his duty to abate on said right of way so under his control and supervision any nuisance, public or private, that might exist thereon.

III.

That on the 18th day of April, 1909, and for more than four years prior thereto, there crossed said railway and right of way at a certain point thereof, so under the jurisdiction of the said John Hamilton as aforesaid, a roadway, recognized as such by the defendants, and used by the traveling public as a public roadway, which said roadway, after crossing said railway and right of way, ran to the town of Baineville, and to points beyond; that with such roadway so used as aforesaid, the defendants recognized the public use of same, and for more than four years next preceding the 18th day of April, 1909, defendants, for the accommodation of the public so using said roadway as it crossed said right of way, constructed and maintained a plank crossing where said roadway crossed its tracks, and erected and maintained at said crossing a railway warning signal to the traveling public using said roadway and constructed and maintained at said point cattle-guards

and fences such as are maintained where public highways cross railroad tracks, and for more than four years next preceding the 18th day of April, 1909, the said defendants treated said roadway as if it were a public highway, and during all of said time the defendants knew that the said roadway so crossing its said track and right of way was used by the traveling public, and was so used without objection and with the tacit consent of the said defendant company. Plaintiff further avers that for more than three years preceding the 18th day of April, 1909, the county commissioners of Valley County assuming that said roadway was a public highway expended public money in its maintenance and repair, so that said **[4]** roadway would be fit and suitable for public travel, which fact the defendants well knew, or in the exercise of reasonable diligence should have known.

IV.

That the defendant company during the month of December, 1908, placed, and caused to be placed, on its said right of way, and in close proximity to said traveled roadway as it passed across said right of way, the carcass of a horse, and the said defendants thereafter negligently permitted and allowed said carcass to remain where it was so placed exposed to view, so that on, and for more than a month prior to the 18th day of April, 1909, the said carcass so remained on said right of way and in close proximity to said roadway, and exhaled noxious and putrid odors offensive to those traveling on said roadway.

V.

Plaintiffs further aver that said carcass so negligently permitted to remain on defendant company's right of way, and so exhaling said odors, become and was a public nuisance, and by reason of its appearance, and by reason of the odors which it exhaled, became an object likely to frighten teams driven along said roadway where said carcass lay, all of which the defendants well knew, or in the exercise of reasonable diligence should have known.

VI.

Plaintiffs further aver that on the said 18th day of April, 1909, one Nettie Ennis, a resident of Valley County, then and there the wife of the plaintiff, Herbert L. Ennis, and then and there the mother of the plaintiff, Guy W. Ennis, was using said roadway, and so using said roadway was riding in a buggy, to which was attached a team of horses, which said team was driven by one John Bigelow, and which said team was then and there, and at all times, gentle and tractable. **[5]**

VII.

That said team being so driven as aforesaid, when at and near the point on said roadway near where said carcass was, became frightened at said carcass and shied at same, and so becoming frightened and shying started to run away, and did run away, and so running away the said Nettie Ennis was thrown violently from said buggy and against a barbed wire fence, and so being thrown she received internal injuries to her kidneys, and other internal organs, and also received bruises and wounds to her body, from

which injuries, bruises and wounds she thereafter died.

VIII.

That by the death of said Nettie Ennis the plaintiff, Herbert L. Ennis, has been deprived of the comfort, society and association of his wife, and that said Guy W. Ennis, has been deprived of the care, supervision, society and attention of a mother, and both of said plaintiffs have been deprived of the services of the said Nettie Ennis, all to their damage in the sum of Twenty-five Thousand ($25,000.00) Dollars.

IX.

Plaintiffs further aver that they are the only heirs at law of the said Nettie Ennis, deceased.

WHEREFORE, plaintiffs demand judgment against the said defendants for the sum of Twenty-five Thousand ($25,000.00) Dollars, together with costs of suit.

R. O. LUNKE,
WALSH & NOLAN,
Attorneys for Plaintiff. **[6]**

State of Montana,
County of Lewis & Clark,—ss.

C. B. Nolan, being first duly sworn, upon oath deposes and says: That he is one of the attorneys of the above-named plaintiffs, and makes this verification in their behalf for the reason that said plaintiffs are absent from the County of Lewis & Clark where said attorney resides; that he has read the foregoing amended complaint and knows the contents thereof, and that the facts therein stated are

true to his best knowledge, information and belief.

C. B. NOLAN.

Subscribed and sworn to before me this 12th day of August, 1911.

[Seal] MATHIAS STAFF,

Notary Public for the State of Montana, Residing at Helena.

My commission expires Feb. 18, 1914.

Filed Aug. 12, 1911. Geo. W. Sproule, Clerk. [7]

Thereafter, on July 27, 1912, a Second Amended Complaint was filed herein, as follows, to wit. [8]

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JOHN HAMILTON,

Defendants.

Second Amended Complaint.

The above-named plaintiffs, first having obtained leave to so do, file this their second amended complaint, and for cause of action against defendants allege:

I.

That at all times hereinafter mentioned, the defendant Great Northern Railway Company was and is a corporation, organized and existing under the

laws of the State of Minnesota, and at all of said times owned and operated a line of railway running across the State of Montana and across Valley County, in said State, and at all of said times owned, in connection with said railway, a right of way, which right of way, at the place hereinafter referred to, as used for a roadway and as the place where the runaway hereinafter referred to occcurred, embraces a strip of ground about seventy-five feet wide on each side of the track, running parallel to said track.

II.

That on the 18th day of April, 1909, and for a long time prior thereto, the defendant John Hamilton was in the employ of the defendant company as section foreman, and as such section foreman had supervision and control of that portion of said railway [9] and right of way of the defendant company more particularly described as follows: That portion of said railway and right of way between Sections 1 and 2, Township 27 North, Range 48 East, Montana Meridian, in Valley County, being the portion of said right of way where said roadway crosses, and as such section foreman, it became and was his duty, for and in behalf of the defendant company to remove from said right of way, so under his control and jurisdiction and abate any nuisance, public or private, that might exist thereon.

III.

That on or about the year 1906, the county commissioners of Valley County, on proceedings taken for that purpose, undertook to lay out a public

highway in said county, for use by the travelling public, and in said year took such steps in relation thereto that a certain roadway was laid out and established by said county commissioners, which said roadway crossed said railway right of way of the defendant company at a certain point thereof, the same being the point heretofore referred to as under the jurisdiction and supervision of the defendant John Hamilton. Plaintiffs further aver that in connection with the laying out and establishing of said roadway, as aforesaid, and in connection with the proceedings so had, as aforesaid, by the said county commissioner, the defendant company granted to said Valley County, for use over its said right of way, a right of way for said roadway, which said right of way, so granted by said defendant company for such roadway, as it crossed the right of way and track of the defendant company, was approximately about sixty feet wide.

IV.

Plaintiffs further aver that the said roadway so attempted to be laid out, as a public highway, as aforesaid was in said year opened for travel and public use, and so open for travel and public use crossed the right of way and tracks of the defendant **[10]** company, as aforesaid, and so opened and used extended to the town of Baineville, in said Valley County, where a postoffice was maintained, and to points beyond, and since said roadway was so opened for travel, in said year, said roadway has been used at all times since then as if it were a public highway by the travelling public.

V.

Plaintiffs further aver that ever since said roadway was laid out and opened, as aforesaid, the county commissioners of Valley County have treated it as if it were a public highway and have expended money in its opening, maintenance and repair.

VI.

Plaintiffs further aver that after said roadway was laid out and opened, as aforesaid, and after said defendant company granted a right of way for same across its said premises, as aforesaid, the defendant company placed and maintained across its tracks a plank crossing for use by the public travelling on said roadway, and ever since said roadway was opened, as aforesaid, the defendant company has placed and maintained, where said roadway crossed its right of way, a warning signal that a public crossing existed there and has installed and maintained fences and cattle-guards bordering said roadway, as the same passes over its said right of way, and has in all respects, since the year 1906, treated said roadway as established across its right of way as if it were a regularly laid out public highway.

VII.

Plaintiffs further aver that the said defendant company, when the said roadway was laid out and opened, as aforesaid, dedicated for public use, an easement for roadway purposes in the ground covered by said roadway, as it crossed its said right of way, and for more than six years last past the defendant company has invited all persons using said roadway, to use that [11] portion of same cross-

ing its right of way, and at all of said times, and now, the defendant company knew that the travelling public used said roadway as it crossed its said premises, and knew that the said roadway was so used by them as if it were a public highway, and this use was enjoyed by the travelling public with the knowledge and consent and permission of the defendant company.

VIII.

Plaintiffs further aver that during the month of December, 1908, the defendant company placed, and caused to be placed on its said right of way and in close proximity to said traveled roadway, and in such position so that it could readily be seen by animals travelling on said roadway, as it crossed said right of way, the carcass of a horse.

IX.

Plaintiffs further aver that the defendant company negligently permitted said carcass to remain where it was so placed by it, as aforesaid, from the month of December, 1908, until the 18th day of April, 1909, and thereafter and for more than a month prior to the said 18th day of April, 1909, the said carcass so in said place, suffering decomposition, exhaled noxious and putrid odors, so that on the 18th day of April, 1909, and for some time prior thereto, on account of the shape it then assumed and on account of the odors it then exhaled, so in close proximity to said roadway, it became and was a public nuisance, and became and was an object likely to frighten teams driven along said roadway, all of which the defendants well knew, or, in the exercise

of reasonable diligence, should have known.

X.

Plaintiffs further aver that on said 18th day of April, 1909, one Nettie Ennis, then and for some years prior thereto, a resident of Valley County, and then the wife of the plaintiff Herbert L. Ennis and the mother of the plaintiff Guy W. Ennis, **[12]** at the invitation of the defendant company, as aforesaid, was using said roadway as one of the travelling public, and, so using said roadway, was riding in a buggy, drawn by a team driven along said roadway, which said team was driven by one John Bigelow and which team was then and there, and at all times, tractable and gentle.

XI.

Plaintiffs further aver that while said team and buggy, so driven as aforesaid, with the said Nettie Ennis in said buggy, on said roadway, in close proximity to where said carcass was, as aforesaid, and while said driver was exercising due care in the management of said horses, and without knowledge on his part, or on the part of the said Nettie Ennis, that the said carcass and the odor therefrom would cause said team to become frightened and run away, the said team, so on said roadway, and in close proximity to where said carcass lay, was frightened by said carcass, and the odor therefrom, and the said carcass and the odor therefrom, at said time, caused said team to run away and the said team, thus running away, caused the said Nettie Ennis so in said buggy, to be thrown violently therefrom, and against a barbed wire fence, and the said Nettie Ennis, so

being thrown from said buggy, as aforesaid, and by reason thereof, received injuries to her kidneys and other internal organs, and also received bruises and wounds on her body, from which injuries, bruises and wounds, and by reason thereof, she thereafter died.

XII.

That by the death of the said Nettie Ennis, the plaintiff Herbert L. Ennis has been deprived of the comfort and society and association of his wife, and the plaintiff Guy W. Ennis has been deprived of the care, supervision, society and attention of a mother, and both of the plaintiffs have been deprived of the services of the said Nettie Ennis, all to their damage in the sum **[13]** of Twenty-five Thousand Dollars.

XIII.

Plaintiffs further aver that they are the only heirs at law of the said Nettie Ennis, deceased.

WHEREFORE, plaintiffs pray judgment against the defendants for the sum of Twenty-five Thousand Dollars, together with costs of suit.

R. O. LUNKE,
WALSH & NOLAN,
Attorneys for Plaintiffs.

United States of America,
District of Montana,—ss.

C. B. Nolan, being duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiffs, and makes this verification on their behalf; that he has read the foregoing second amended complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

Affiant further says that he makes this verification for the reason that the plaintiffs are absent from the County of Lewis and Clark, State of Montana, in which county affiant is and resides.

C. B. NOLAN.

Subscribed and sworn to before me this 27th day of July, 1912.

[Seal] C. E. PEW,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires Sept. 30, 1914.

Filed July 27, 1912. Geo. W. Sproule, Clerk. [14]

Thereafter, on January 20, 1913, Demurrer to second amended complaint was filed herein, as follows, to wit: [15]

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, et al.,

Defendants.

Demurrer to Second Amended Complaint.

Comes now the defendant, Great Northern Railway Company, leave of Court having been first had and obtained to further plead to said complaint without waiving and expressly preserving to the defendant

exceptions to the rulings heretofore made in this cause and heretofore settled or to be settled in Bills of Exceptions herein, and demurs to the second amended complaint of the plaintiffs on file herein, and, as grounds of demurrer, says: That said complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

VEAZEY & VEAZEY,

Attorneys for Defendant, Great Northern Railway Company.

Filed Jan. 20, 1913. Geo. W. Sproule, Clerk. [16]

Thereafter, on January 27, 1913, an order overruling the demurrer to second amended complaint was entered herein, as follows, to wit:

[Order Overruling Demurrer to Second Amended Complaint, etc.]

In the District Court of the United States, in and for the District of Montana.

No. 960.

H. L. ENNIS et al.,

vs.

GREAT NORTHERN RAILWAY CO.

This cause came on regularly for hearing at this time upon demurrer to second amended complaint, and thereupon by consent of counsel, demurrer submitted without argument; whereupon, after due consideration, it is ordered that said demurrer be and the same hereby is overruled, and exception of defendant noted, and said defendant granted leave to

plead to second amended complaint without waiving exception.

Entered in open court January 27, 1913.

GEO. W. SPROULE,
Clerk. **[17]**

Thereafter, on February 15, 1913, answer to second amended complaint was filed herein, as follows, to wit: **[18]**

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY (a Corporation), and JOHN HAMILTON,
Defendants.

Answer to Second Amended Complaint.

Leave of Court having been first had and obtained to further plead to the second amended complaint of the plaintiffs on file herein, without waiving and expressly preserving to this defendant exceptions to the rulings heretofore made in this cause, or heretofore settled or to be settled in bills of exceptions herein; comes now the defendant, Great Northern Railway Company, and for its answer to said second amended complaint of the plaintiffs, admits, alleges, and denies as follows, to wit:

I.

For its first separate answer to said second amended complaint, this answering defendant ad-

mits, alleges, and denies, as follows:

1. Save as hereinafter specifically admitted or denied, this answering defendant denies each and every allegation, matter, and thing in said second amended complaint contained.

2. This answering defendant admits the allegations of Paragraph I, of said second amended complaint. This answering defendant further admits that on the 18th day of April, 1909, and for more than a month prior thereto, John Hamilton, named in said second amended complaint, was in the employ of **[19]** this answering defendant, in a position known as "Section Foreman" of the railway of this answering defendant; and that a portion of said railway and right of way, referred to in Paragraph II, of said second amended complaint, was a part of that section of this answering defendant's railway, of which the said John Hamilton was, as aforesaid, section foreman.

3. In regard to the allegations of paragraphs numbered III, IV, V, VI, and VII of said second amended complaint, this answering defendant admits that on the 18th day of April, 1909, and for six months prior thereto, there crossed said railway and right of way, at a certain point thereon, a roadway; and that said roadway ultimately connected with a roadway extending to the town of Bainville, in Valley County, Montana, where a postoffice was maintained, and to points beyond; and that at the point where said roadway, crossing the track of this answering defendant, crossed the right of way of this answering defendant, there are, and always have

been since said roadway existed, fences and cattle-guards bordering the said roadway.

4. In regard to the allegations of paragraph VIII and IX, of said second amended complaint, this answering defendant admits that during the period stated in said paragraphs of said second amended complaint, the carcass of a horse lay near where the Nettie Ennis and John Bigelow, named in said second amended complaint, last attempted to drive across the railroad track of this answering defendant; and that this answering defendant and the said John Hamilton did not, during said period, remove said carcass.

5. This answering defendant further admits that at the time stated in paragraph X of said second amended complaint, the Nettie Ennis therein named was using said roadway and was riding in a buggy, drawn by a team driven by the John Bigelow therein named; and that, when near the point where the said **[20]** Nettie Ennis and John Bigelow attempted to drive said team across said track, the said team became frightened and ran away, and the said Nettie Ennis received injuries in said runaway, and thereafter died. But this answering defendant specifically denies that said team became frightened by said carcass and shied at the same; and this answering defendant specifically denies that said runaway was, in any manner or to any extent, caused by said carcass, or by its presence at the place aforesaid.

II.

For its second separate answer to said second amended complaint, this answering defendant says,

that, if this answering defendant was in any respect negligent in any of the matters stated in the second amended complaint herein, then and in that event plaintiffs' damage, if any, was due to, and caused by, their own contributing fault and carelessness, and to the contributing fault and carelessness of said Nettie Ennis, their and her agents, servants, and employees; and to the failure on the part of the plaintiffs and on the part of said Nettie Ennis, their and her agents, servants, and employees, and each of them, to exercise such reasonable care and caution, for the safety of said Nettie Ennis, as would, could and should, and ordinarily would, have been exercised by the average reasonably prudent person, under all the circumstances then and there existing, at all times and places stated in the complaint; and to the fact that the said Nettie Ennis and the said John Bigelow so negligently drove the said team of horses that the same ran away and escaped from their control. Further answering, this answering defendant says, that, if the matters of fact stated in said second amended complaint are true, then and in that event, in the exercise of such reasonable care and caution as the average reasonably prudent person, under all the circumstances then and there existing, would, could, and should, and ordinarily would, **[21]** have exercised, the plaintiffs, the said Nettie Ennis, their and her agents, servants and employees and the said John Bigelow would have known—and, in fact, actually did know—the facts stated in said second amended complaint, if the same were or are true and they, and each of them, had the last clear chance to

avoid the alleged negligence of this answering defendant and the damages, if any, resulting therefrom, and to avoid the said runaway and by the exercise of such reasonable care and caution aforesaid, as the average reasonably prudent person, under all the circumstances, would, could, and should, and ordinarily would, have exercised, they, and each of them, could, should, and would, and ordinarily would, have discovered and avoided the alleged negligence, if any, of this answering defendant, and the alleged dangers alleged in the complaint.

WHEREFORE, having fully answered, this answering defendant prays that it may be dismissed hence with its costs of suit.

VEAZEY & VEAZEY,
Attorneys for Defendant, Great Northern Railway Company **[22]**

State of Montana,
County of Cascade,—ss.

I, Parker Veazey, Jr., being first duly sworn, deposes and says: That he is one of the attorneys for the defendant, Great Northern Railway Company, in the foregoing entitled cause; that he has read the foregoing answer to second amended complaint and knows the contents thereof, and that the matters and things therein stated are true to the best of affiant's knowledge, information and belief. That affiant makes this affidavit for and on behalf of said defendant, Great Northern Railway Company, for the reason that said defendant company is a corporation and none of the officers of said corporate defendant are within the County of Cascade, State and District

of Montana, wherein affiant is and resides and where this affidavit is made.

I. PARKER VEAZEY, Jr.

Subscribed and sworn to before me this 14th day of February, 1913.

[Seal] R. B. NOONAN,

Notary Public for the State of Montana, Residing at Great Falls, Cascade County, Montana.

My commission expires Nov. 18, 1915.

Filed Feb. 15, 1913. Geo. W. Sproule, Clerk. [23]

Thereafter, on February 27, 1913, Reply was filed herein, as follows, to wit: [24]

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Reply.

Now comes the plaintiffs and for reply to defendants' answer to the second amended complaint, admit, allege and deny, as follows:

I.

Denies each and all of the allegations of said second separate answer so called.

WHEREFORE, plaintiffs renew their prayer for judgment as in their complaint prayed.

R. O. LUNKE,
WALSH & NOLAN,
Attorneys for Plaintiffs. [25]

State of Montana,
County of Lewis and Clark,—ss.

C. B. Nolan, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the foregoing entitled action; that he has read the foregoing replication and knows the contents thereof and the same is true of the best of his knowledge, information and belief;

That the reason he makes this verification is because the plaintiffs are absent from the County of Lewis and Clark, wherein affiant is and resides.

C. B. NOLAN.

Subscribed and sworn to before me this 18th day of February, 1913.

[Seal] J. R. WINE, Jr.,
Notary Public in and for the State of Montana; Residing at Helena, Montana.

My commission expires November 13, 1914.

Filed Feb. 27, 1913. Geo. W. Sproule, Clerk. [26]

Thereafter, on July 2, 1914, the Verdict of the jury was filed herein, as follows, to wit:

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY and JOHN HAMILTON,
Defendants.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiffs and against the defendant, Great Northern Railway Company, and assess their damages in the sum of $8,000.00 Dollars.

NELSON STORY, Jr.,
Foreman.

Filed July 2, 1914. Geo. W. Sproule, Clerk. [27]

Thereafter, on July 2, 1914, Judgment was duly entered herein, in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY and JOHN HAMILTON,
Defendants.

Judgment.

The above-entitled cause coming on to be heard on the 30th day of June, 1914, R. O. Lunke, Esq., and Messrs. Wash, Nolan & Scallon appearing as counsel for the plaintiffs, and Messrs. Veazey & Veazey for the defendant, Great Northern Railway Company, a jury of twelve persons was regularly impanelled, charged and sworn to try said action. Whereupon witnesses on the part of the plaintiffs and defendant, Great Northern Railway Company, were duly sworn and examined. After hearing the evidence, the arguments of counsel and the charge of the court, the jury retired to consider of their verdict, and thereafter on the 2d day of July, 1914, returned into court their verdict in favor of the plaintiffs and against the said defendant, Great Northern Railway Company, and assessing the plaintiffs' damages at the sum of Eight Thousand ($8,000.00) Dollars.

Wherefore, by virtue of the law and by reason of the premises aforesaid, on motion of C. B. Nolan, Esq., one of the attorneys for the plaintiffs, it is ordered and adjudged that the plaintiffs do have and recover of and from the defendant, Great Northern Railway Company, the sum of Eight Thousand ($8,000.00) [28] Dollars, together with their costs herein, taxed at $398.70.

Judgment entered July 2d, 1914.

GEO. W. SPROULE,
Clerk.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 2d day of July, A. D. 1914.

[Seal] GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed July 2d, 1914. Geo. W. Sproule, Clerk. [29]

That on September 7, 1911, the defendant Great Northern Railway Company filed herein its Bill of Exceptions to the order of the Court allowing amendment to the original complaint, said Bill of Exceptions being as follows, to wit: [30]

In the Circuit Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JOHN HAMILTON,
Defendants.

Bill of Exceptions [to Order Allowing Amendment of Complaint].

BE IT REMEMBERED, that this cause came on regularly for trial upon the complaint of the plaintiffs, the amended answer of the defendant Great Northern Railway Company thereto and the reply of the plaintiffs to said amended answer. That said complaint was and is in the words and figures as follows, to wit: [31]

In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Valley.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JOHN HAMILTON,
Defendants.

Complaint [in Bill of Exceptions].

The plaintiff above named complains of the defendants, and for cause of action alleges:

I.

That at all times hereinafter mentioned the defendant Great Northern Railway Company was and now is a corportion organized and existing under the laws of the State of Minnesota, and at all of said times owned and operated a line of railway, running across the State of Montana, and across Valley County, in said State, and at all of said times owned,

in connection with said railway, what is known as its right of way.

II.

That on the 18th day of April, 1909, and for more than a month prior thereto the defendant John Hamilton was in the employ of the defendant company as section foreman, and as such section foreman had supervision and control of that portion of the railway and right of way of the defendant company, more particularly described as follows: That portion of said railway and right of way between sections 1 and 12, Township 27, North of Range 38 East of the Montana Meridian in Valley County, [32] Montana, and as such section foreman it became and was his duty to abate on said right of way so under his control any nuisance, public or private, that might exist thereon.

III.

That on the said 18th day of April, 1909, and for more than a month prior thereto, there crossed said railway and said right of way a public highway, regularly used as such by the traveling public.

IV.

That the defendant company, so owning said right of way, and the defendant John Hamilton so in the employ of said defendant company as its section foreman for more than a month immediately preceding the said 18th day of April, 1909, placed and negligently permitted and allowed to remain on said right of way, at and near where said public highway crossed the same, the carcass of a horse, which said carcass so remaining there became and was a public

nuisance, and so remaining there in close proximity to said highway became and was an object likely to frighten teams driven on said highway, all of which the defendants well knew, or, in the exercise of reasonable diligence, should have known.

V.

That on said 18th day of April, 1909, one Nettie Ennis, then and there the wife of the plaintiff Herbert L. Ennis, and then and there the mother of the plaintiff Guy W. Ennis, had occasion to use said highway, and, so using it, was riding in a buggy to which was attached a team of horses, which said team was driven by one John Bigelow, and which said team was then and there, and at all times, gentle and tractable.

VI.

That said team being so driven, as aforesaid, when at and near the point on said highway near where said carcass was, [33] became frightened by said carcass and shied at same, and so becoming frightened and so shying, started to run away, and so starting, the said Nettie Ennis was thrown violently from said buggy and against a barb wire fence, and so being thrown she received internal injuries to her kidneys and other internal organs and also received bruises and wounds to her body, from which injuries, bruises and wounds she thereafter died.

VII.

That by the death of the said Nettie Ennis, the plaintiff Herbert L. Ennis has been deprived of the comfort, society and association of his wife, and the said Guy W. Ennis has been deprived of the care,

supervision and attention of a mother, and both of said plaintiffs have been deprived of the services of the said Nettie Ennis, all to their damage in the sum of Twenty-five Thousand Dollars.

VIII.

Plaintiffs further aver that they are the only heirs at law of the said Nettie Ennis, deceased.

WHEREFORE, Plaintiffs demand judgment against the said defendants for the sum of Twenty-five Thousand Dollars ($25,000.00), together with costs of suit.

R. O. LUNKE and
WALSH & NOLAN,
Attorneys for Plaintiffs.

(Duly verified.) [34]

BE IT FURTHER REMEMBERED, that by said amended answer the defendant railway company denied each and every allegation, matter and thing in paragraph 3 of the said complaint contained and denied that the road referred to in said complaint was a public highway. That at the trial of said cause plaintiffs sought to introduce evidence that for more than four years prior to the 18th day of April, 1909, there crossed said railway and right of way a roadway used by the traveling public; that said use of said roadway was known during said times to the defendant railway company and that, during said period, the said defendant for the accommodation of the public so using said roadway, as it crossed the right of way of said defendant constructed and maintained a plank crossing where said roadway crossed its tracks and erected and maintained at said cross-

ing a railway warning signal to the traveling public using said roadway, and constructed and maintained at said point cattle-guards and fences such as are maintained where public highways cross railroad tracks, and that, during all of said time, the defendant railway company knew that the said roadway so crossing the said track and right of way was used by the traveling public and was so used without objection and with the tacit consent of the said defendant company. That upon said trial the said defendant railway company objected to this evidence for the reason that the same was incompetent, irrelevant and immaterial and not within the issues raised by the pleadings in this case in that, and for the further reason that, it was alleged in the complaint that the road and crossing referred to was a public highway and that said facts sought to be introduced in evidence did not prove or tend to prove that said road was a public highway. That thereupon the Court sustained said objections and the plaintiffs thereupon applied to the Court for leave to amend the complaint by striking out from said complaint the allegation that said crossing was a public highway and by inserting in lieu thereof allegations of fact in accordance with the evidence so sought to be introduced by them, and showing that plaintiffs' ancestor Nettie Ennis was using said crossing at the invitation of said defendant company. That thereupon defendant railway company objected to the allowance of said amendment for the reason [35] and upon the grounds that thereby the plaintiffs sought to incorporate into said complaint a new cause of action not theretofore

stated or attempted to be stated in said complaint in that by said original complaint the plaintiffs charge that the place where said defendant's alleged duty arose to the plaintiffs' ancestor was a public highway and therefore the said defendant was charged with having violated duties alleged to have been owing by the defendant to the said ancestor by reason of her presence upon a public highway, whereas the amendment in question changed the place where the said defendant's duties were alleged to have arisen and charged the said defendant, not with violating any duties owing to persons upon a public highway, but charged the said defendant with violating duties owing by it to the said ancestor not upon a public highway but as a person invited by said defendant upon its premises.

Which objection was by the Court overruled and the plaintiffs given leave to amend said complaint accordingly; to which ruling of the Court, defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

And now, therefore, in furtherance of justice and that right may be done the defendant Great Northern Railway Company presents the foregoing as and for its bill of exceptions in this cause and prays that the same may be settled and allowed and signed and certified by the judge of the above-entitled court who presided at said cause when said ruling was made,

and said proceedings had, as provided by law.

VEAZEY & VEAZEY,

Attorneys for Defendant Great Northern Railway Company. [36]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, et al.,

Defendants.

Order Settling and Allowing Bill of Exceptions [to Order Allowing Amendment of Complaint].

This cause coming on regularly before the Court this day to be heard upon the application of the defendant Great Northern Railway Company for the settling and allowance of its proposed bill of exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of Court, and it appearing to the Court that said bill of exceptions was duly served upon the plaintiffs by service upon their attorneys within ten days after the ruling in said bill referred to was made and that within ten days after such service and within the time allowed by law or rules of Court for the service of amendments to said bill no amendments were served by the plaintiffs or their attorneys, and the matter of the settlement of said bill of exceptions coming on now regularly to be heard, it is now ordered that the foregoing bill of

exceptions be, and hereby is, declared to be a true bill of exceptions in said cause, and the same is hereby settled and allowed as a true bill of exceptions of said defendant Railway Company in said cause, and the same is now hereby certified accordingly to be such true bill of exceptions by the undersigned the presiding judge of said Court who tried said cause and who presided at said cause [37] when the ruling therein referred to was made and the proceedings therein set forth were had, and it is ordered that the same be filed nunc pro tunc as of August 8th, 1911, and be made a part of the record herein.

Dated this 7th day of September, 1911.

CARL RASCH,

United States District Judge, Presiding in Said Circuit Court.

Helena, Mont., Aug. 21, 1911.

Messrs. Veazey & Veazey,
Attorneys at Law,
Great Falls, Montana.

Gentlemen:

Your favor of the 17th inst. is at hand with copy of bill of exceptions in the Ennis case.

Very truly yours,

WALSH & NOLAN.

[Indorsed]: Filed Sept. 7, 1911. Geo. W. Sproule, Clerk. [38]

That on May 3, 1914, defendant railway company filed herein its Bill of Exceptions to the ruling of the Court on motion to strike the first amended complaint, said Bill of Exceptions being as follows, to wit: [39]

In the District Court of the United States, District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, et al.,
Defendants.

Order Settling and Allowing Bill of Exceptions [to Ruling on Motion to Strike First Amended Complaint].

This cause coming on regularly before the Court this day to be heard upon the application of the defendant Great Northern Railway Company for the settling and allowance of its proposed bill of exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of court, and it appearing to the court that said Bill of Exceptions was duly served upon the plaintiffs by service upon their attorneys within ten days after the ruling in said bill referred to was made and that within ten days after such service and within the time allowed by law or rules of court for the service of amendments to said bill no amendments were served by the plaintiffs or their attorneys, and the matter of the settlement of said

bill of exceptions coming on now regularly to be heard, IT IS NOW ORDERED: That the foregoing bill of exceptions be, and hereby is, declared to be a true bill of exceptions in said cause, and the same is hereby settled and allowed as a true bill of exceptions of said defendant railway company in said cause, and the same is now hereby certified accordingly to be such true bill of exceptions by the undersigned, the presiding judge of said court, who tried said cause and who presided at said cause when the ruling therein referred to was made and the proceedings therein set forth were had, and it is ordered the same be filed nunc pro tunc as of April 15th, 1912, and be made a part of the record herein.

Dated this 3d day of May, 1912.

GEO. M. BOURQUIN,
United States District Judge. [40]

In the District Court of the United States, District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, et al.,

Defendants.

Bill of Exceptions [to Ruling on Motion to Strike First Amended Complaint].

BE IT REMEMBERED, That, heretofore, to wit, on the 15th day of April, 1912, this cause came on

regularly for hearing upon the motion of the defendant Great Northern Railway Company to strike certain portions of the amended complaint herein and to strike said amended complaint herein, which said motion was heretofore duly and regularly served and noticed, and as so served, noticed and made is in words and figures, as follows, to wit: [41]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JOHN HAMILTON,
Defendants.

Motion [to Strike Amended Complaint or Certain Parts Thereof].

Comes now the defendant Great Northern Railway Company and severally moves the Court to strike from the amended complaint of the plaintiffs on file herein each and all of the averments and matters hereinafter set forth, upon the ground that the matter so sought to be stricken is redundant, surplusage, irrelevant and immaterial, and is not within the terms of the order permitting the original complaint herein to be amended, and, except as it is redundant, surplusage, irrelevant and immaterial, is unintelligible and uncertain and renders said complaint ambiguous, unintelligible and uncertain; that is to say:

By the original complaint the plaintiffs charged that the road crossing in question was a public highway and, upon the occurrence of the variance between the said allegation of said complaint and the proof offered at the trial failing to establish that said crossing was a public highway, the plaintiffs sought, and obtained, leave to strike from their complaint the allegation that said crossing was a [42] public highway, *the plaintiffs sought, and obtained, leave to strike from their complaint the allegation that said crossing was a public highway* and to amend said complaint by inserting allegations showing that the use of said crossing by the deceased and by the public was made with the knowledge and consent, and even by the invitation of the defendants, and it appears from said amended complaint that although if said allegations, so sought to be stricken, are stricken from the amended complaint, the said amended complaint would constitute a clear, forcible and intelligible statement of the facts which the plaintiffs conceive constitute their cause of action, and would clearly set forth the theory upon which the plaintiffs intend to proceed, that is to say: The theory that said crossing was not a public highway, but was a crossing which the deceased and the traveling public were using with the knowledge and consent, and by the invitation of the defendants; nevertheless, by the insertion of said matter so sought to be stricken, the said clear, forcible and intelligible statement of plaintiffs' allleged cause of action is rendered ambiguous, unintelligible and uncertain, for, by the insertion of said matter so sought to be stricken, it

cannot be ascertained from said complaint whether:

(1) The plaintiffs mean thereby merely unnecessarily and redundantly to repeat the allegations therein contained clearly and forcibly charging, as aforesaid, the use of said crossing by the public and defendants' knowledge and consent to such use, and its invitation to the deceased and to the public to use the same, in which case the said matter so sought to be stricken is redundant and surplusage and immaterial and does not add to the validity of the facts otherwise set forth in said amended complaint; or whether,

(2) The plaintiffs mean again to charge and again to seek to litigate that the crossing in question was a public [43] highway, in which event the said matter, so sought to be stricken, is inserted in said complaint without leave of Court and after plaintiffs had asked for, and obtained, leave to strike the same from the original complaint herein and to abandon the said allegation that the said crossing was a public highway and to allege the said use of the same with the knowledge and consent, and by the invitation, of the defendants, as aforesaid; or whether,

(3) The plaintiffs mean to charge that the said crossing was not, in fact, a public highway, but was a crossing used by the traveling public with the knowledge and consent, and even by the invitation, of the defendants, in which event the said matter so sought to be stricken is immaterial and does not add to the averments otherwise contained in said complaint or assert facts constituting any part of said alleged cause of action to recover the damages

for the neglect of a duty owing by the defendants to the deceased, as a person invited by the defendants, or licensed by the defendants, to use said crossing.

The following is the matter sought to be stricken, to wit:

All that part of paragraph III, reading as follows:

(1) "recognized as such by the defendants."

(2) "As a public roadway"

(3) "the defendants recognized the public use of the same."

(4) "the said defendants treated said roadway as if it were a public highway."

(5) The last sentence of said paragraph III reading as follows: "Plaintiff further avers that for more than three years preceding the 18th day of April, 1909, the county commissioners of Valley County assuming that said roadway was a public highway expended public money [44] in its maintenance and repair, so that said roadway would be fit and suitable for public travel, which fact the defendants well knew, or in the exercise of reasonable diligence should have known."

(6) The whole of said amended complaint upon the further ground that by said amended complaint the plaintiffs seek to state a new cause of action not theretofore stated or attempted to be stated in said original complaint, in that, by said original complaint the plaintiffs sought to state a cause of action for damages resulting from an alleged violation of duties owing by the defendants to persons upon a public highway, but by said amended complaint the plaintiffs seek to state a cause of action to recover dam-

ages resulting from an alleged violation of duties owing by the defendants to persons invited or licensed by it to use its premises.

VEAZEY & VEAZEY,

Attorneys for Defendant Great Northern Railway Company. [45]

BE IT FURTHER REMEMBERED: That the original complaint herein and the said amended complaint herein referred to in said motion are correctly and fully set forth in the Bill of Exceptions heretofore presented by defendant Great Northern Railway Company herein and heretofore settled, signed, certified and filed to the order permitting the original complaint herein to be amended, to which record thereof in said Bill of Exceptions reference is hereby made, and the same are, by this reference made a part of this Bill of Exceptions as fully and to all intents and purposes as if here set out at length.

BE IT FURTHER REMEMBERED: That, thereafter, said motion was duly argued by counsel for the plaintiffs and by counsel for the defendant Great Northern Railway Company and submitted to the Court for judgment and decision, and, thereupon, the Court overruled said motion to strike and the whole thereof, and each and every motion therein made by said defendant Great Northern Railway Company, the Court being of the opinion that the amendment does not intend to and does not allege, that the place of the accident was a public highway but only a roadway used by the public by the defendant company's license, acquiescence, permission or invitation, and plaintiffs' counsel having, at the

argument of said motion, disclaimed any intention to allege that the place of the accident was a highway, and having stated that the only intention of said allegations was to allege that the place of the accident was a roadway by the defendant company's license, acquiescence, permission or invitation.

The opinion of the Court in overruling said motion is as follows: [46]

In the District Court of the United States, District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Herein the motion of defendant railway company to strike from the amended complaint is denied.

Memorandum [Opinion on Motion to Strike].

I am of the opinion the amendment is within the order allowing it. It is evident the amendment does not intend to and does not allege that the place of the accident was a highway, but only a roadway, open to and used by the public, by the defendant company's invitation, license or acquiescence. Nor is there any change of the cause of action. The gist thereof, both in the original complaint and in the amended complaint, was and is alleged to be an injury to a deceased person, causing death (the right to recover damages for which is claimed by plain-

tiffs), due to neglect of the defendant company in leaving on its right of way a dead horse, near a crossing place over said right of way. The fact that the original complaint alleged the crossing place was a highway, and the amended complaint alleges it was a way by invitation, acquiescence or license, does not show a change of the cause of action, though it may show a different character of duty owed, if any, and a different grade or quality of negligence permitted, if any.

April 16, 1912.

GEO. M. BOURQUIN,
Judge. [47]

To which ruling of the Court in overruling said motion in its entirety, and to each and every ruling of the Court in refusing to strike the said several portions of said complaint as prayed for in said motion, said defendant Great Northern Railway Company, by its counsel, then and there duly excepted, and severally excepted; which said exceptions were each then and there duly noted and allowed, and are each hereby preserved.

And, now, therefore, in furtherance of justice and that right may be done, the defendant Great Northern Railway Company presents the foregoing as and for its bill of exceptions in this cause and prays that the same may be settled and allowed, signed and certified by the Judge of the above-entitled court who presided at said cause when said rulings were made, and said proceedings had, as provided by law.

VEAZEY & VEAZEY,
Attorneys for Defendant Great Northern Railway Company.

IT IS HEREBY STIPULATED, by and between the parties plaintiff and defendant Great Northern Railway Company in the above-entitled cause, that the foregoing bill of exceptions is true and correct, and that the same may be settled and allowed, signed and certified by the judge of the above-entitled court, who presided at said cause when said rulings were made and said proceedings had, as provided by law.

Dated 29th April, 1912.

R. O. LUNKE and
WALSH & NOLAN,
Attorneys for Plaintiffs.
VEAZEY & VEAZEY,
Attorneys for Defendant Great Northern Railway Company.

Filed May 3, 1912. Geo. W. Sproule, Clerk. [48]

That on February 15, 1913, defendant railway company filed herein its Bill of Exceptions to the ruling of the Court on motion to strike the second amended complaint herein, said Bill of Exceptions being in the words and figures following, to wit: [49]

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS et al.,
Plaintiffs,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, et al.,
Defendants.

Bill of Exceptions [to Ruling on Motion to Strike Second Amended Complaint].

BE IT REMEMBERED, That heretofore—to wit, on the seventh day of January, A. D. 1913—this cause came on regularly for hearing upon the motion of the defendant, Great Northern Railway Company, to strike certain portions of the second amended complaint herein, and to strike said second amended complaint herein, which said motion was heretofore duly and regulary served and noticed; and as so served, noticed, and made, is in words and figures as follows, to wit: [50]

In the District Court of the United States in and for the District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JOHN HAMILTON,
Defendants.

Motion to Strike [Certain Parts of Second Amended Complaint].

To Herbert L. Ennis and Guy W. Ennis, Plaintiffs in the Above-entitled Cause and to Messrs. Walsh & Nolan and R. O. Lunke, Esq., Their Attorneys:

You and each of you will please take notice that the defendant Great Northern Railway Company, on Monday, the 16th day of September, 1912, at ten

o'clock A. M. on said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court at the city of Helena, Montana, will move the Court as set forth in the annexed written motion, which for purposes of notice is, by this reference, made a part hereof.

The foregoing motion will be made as an entirety, and also as a several motion as to each matter and thing sought to be stricken, and said motion as an entirety is, and said several motions are each, made and based upon the grounds and matters set forth in said written motion.

VEAZEY & VEAZEY,

Attorneys for Defendant Great Northern Railway Company. [51]

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JOHN HAMILTON,
Defendants.

Motion to Strike.

Comes now the defendant Great Northern Railway Company and severally moves the Court to strike from the second amended complaint of the plaintiffs on file herein each and all of the averments and matters hereinafter set forth as the several and respective matters and averments hereby sought to be stricken, to wit:

1. All that part of paragraph III of said second amended complaint reading as follows, to wit:

> "the county commissioners of Valley County, on proceedings taken for that purpose, undertook to lay out a public highway in said county, for use by the travelling public, and in said year took such steps in relation thereto that a certain roadway was laid out and established by said county commissioners, which."

2. All that part of paragraph III of said second amended complaint reading as follows, to wit:

> "Plaintiffs further aver that in connection with the laying out and establishing of said roadway, as aforesaid, and in connection with the proceedings so had, as aforesaid, by the said county commissioner, the defendant company granted to said Valley County, for use over its said right of way, a right of way for said roadway, which said right of way, so granted by said defendant company for such roadway, as it crossed the right of way and track of the defendant company, was approximately about sixty feet wide." [52]

3. All that part of paragraph IV of said second amended complaint reading as follows, to wit:

> "so attempted to be laid out, as a public highway, as aforesaid, was in said year opened for travel and public use, and so open for travel and public use."

4. In paragraph IV of said second amended complaint, from the averment "and so opened and used extended to the town of Baineville" strike out the

words: "so opened and used."

5. All that part of paragraph IV of said second amended complaint reading as follows, to wit:

> "since said roadway was so opened for travel, in said year, said roadway."

6. From the expression "as if it were a public highway" in paragraph IV of said second amended complaint, strike out the words: "if it were" and the word "public."

7. All of paragraph V of said second amended complaint.

8. All that part of paragraph VI of said second amended complaint reading as follows, to wit:

> "after said roadway was laid out and opened, as aforesaid, and after said defendant company granted a right of way for the same across its said premises, as aforesaid."

9. All that part of paragraph VI reading as follows, to wit: "said roadway was opened, as aforesaid."

10. In paragraph VI of said second amended complaint, from the averment "a warning signal that a public crossing existed," strike out the word: "public."

11. All that part of paragraph VI of said second amended complaint reading as follows, to wit:

> "and has in all respects, since the year 1906, treated said roadway as established across its right of way as if it were a regularly laid out public highway."

12. All that part of paragraph VII of said second amended complaint reading as follows:

"the said defendant company, when the said roadway was laid out and opened, as aforesaid, dedicated for public use, an easement for roadway purposes in the ground covered by said roadway, as it crossed its said right of way, and." [53]

13. All that part of paragraph VII of said second amended complaint reading as follows, to wit:

"and knew that the said roadway was so used by them as if it were a public highway."

The foregoing motion is made as an entirety, and also as a several motion as to each matter and thing sought to be stricken, and said motion as an entirety is, and said several motions are each made upon the grounds following, that is to say:

I. The order heretofore made permitting the plaintiffs to amend their complaint was an order granting leave to the plaintiffs to amend an amended pleading after the sustaining of a demurrer to said amended pleading, and the same was made upon merely the oral *ex parte* application of the plaintiffs and without notice to this defendant, and without any showing by affidavit or under oath being made as to the right or propriety of said order being made, and without the Court having presented to it the resulting prejudice to this defendant, and the granting of said order, as a general order permitting said complaint to be amended without notice to this defendant or an opportunity to be heard, and without preserving to this defendant the right to show why said order should not be made and why the same would and does operate to prejudice the interests of this

defendant, and without imposing terms upon the plaintiff, and particularly without the imposition of any costs upon the plaintiff and without awarding costs to this defendant in the light of the facts set forth in subdivision two hereof, if permitted to stand, would constitute an abuse of discretion to the prejudice and disadvantage of this defendant, for that, as shown by the facts set forth in subdivision two hereof, the facts and things which the plaintiffs, by said second amended complaint, and especially by the said portions thereof sought to [54] be stricken, now seek to litigate with this defendant have already been litigated between the plaintiffs and this defendant, and by said order and by said second amended complaint remaining on file herein the plaintiffs are again permitted to litigate said matters which have been already heretofore decided adversely to them, and which they have conclusively elected not again to litigate and which they have conclusively elected to abandon and to litigate which they are estopped, and this without the imposition of the costs of the previous trial, or upon any terms whatsoever protecting the rights of this defendant.

II. By said second amended complaint the plaintiffs seek again to litigate matters, facts and things heretofore, at the trial of this cause before the Court and a jury, once already litigated between the plaintiffs and this defendant and determined adversely to the plaintiffs, and by said second amended complaint the plaintiffs seek again to litigate matters, facts and things, which by reason of the facts hereinafter set forth and appearing of record herein, the plaintiffs are now es-

topped from litigating, and by said second amended complaint the plaintiffs seek again to litigate matters, facts and things which they have heretofore conclusively elected not to litigate with this defendant, and which they have conclusively elected to abandon, that is to say:

This cause was heretofore tried before the Court and a jury upon the original complaint of the plaintiffs, the amended answer of this defendant thereto and the plaintiff's reply to said amended answer. Said original complaint alleged that the roadway therein referred to (being the roadway referred to in second amended complaint herein) was "a public highway," and that the same was "a public highway regularly used as such by the travelling public," and this defendant by said amended answer denied said allegations and denied that the roadway in question was a public highway. At the trial of said cause before the Court and a jury, the plaintiffs sought to introduce evidence in support of said averments of said original complaint that said roadway was a public highway, and the question as to whether or not the said roadway was a public highway was one of the matters and things which were litigated at said trial, and which the plaintiffs sought to prove and which the defendant sought to disprove by evidence adduced at said trial. At said trial, [55] in support of said averments of said original complaint, the plaintiffs sought to introduce evidence that, for more than four years prior to the 18th day of April, 1909, there crossed the railway referred to in said original complaint (being the railway referred to in

said second amended complaint) a roadway used by the travelling public, and that said use of said roadway was known during said times to the defendant company, and that during said period the said defendant, for the accommodation of the public so using said roadway as it crossed the said right of way of said defendant, constructed and maintained a planked crossing where said roadway crossed its tracks, and erected and maintained at said crossing a railway warning signal to the travelling public using said roadway, and constructed and maintained at said point cattle-guards and fences such as are maintained at public highways across railroad tracks, and that, during all of said times, the defendant railway company knew that said roadway, so crossing said track and right of way, was used by the travelling public, and that the same was so used without objection and with the tacit consent of said defendant company. Upon the trial of said cause, however, this defendant railway company objected to this evidence for the reason that the same was incompetent, irrelevant and immaterial and not within the issues raised by the pleadings in this cause, in that, and for the further reason that, it was alleged in the complaint that the road and crossing referred to was a public highway, and that said facts sought to be introduced in evidence did not prove or tend to prove that said road was a public highway. Thereupon, at said trial, the Court sustained said objections and the plaintiffs thereupon accepted and abided by said ruling of the Court and did not seek to have the same reviewed, and they thereupon applied to the Court

for leave to amend the complaint by striking out from said complaint the allegation that said crossing was a public highway and inserting in lieu thereof allegations of fact in accordance with the evidence so sought to be introduced by them and showing that plaintiffs' ancestor, Nettie Ennis, named in said original complaint (and in said second amended complaint) was using said crossing at the invitation of said defendant, which said application by plaintiffs to amend their complaint was accordingly, over the objection of this defendant that the same constituted an attempt to state a new cause of action, by the Court granted. Thereupon the plaintiffs attempted to amend their said complaint in accordance with the said order permitting the same to be amended by filing herein their first amended complaint herein. Thereupon this defendant moved the Court to strike certain portions, and the whole, of said first amended complaint from the files upon the ground that said amended complaint was not within the order permitting the said original complaint to be amended, in that, in said amended complaint and the portions thereof sought to be stricken, the plaintiffs evidently meant again to seek to litigate the question whether or not the crossing in question was a public highway, and upon the ground that the plaintiffs were seeking to escape from their said election to abide by said ruling of said Court, and were seeking again to litigate the question of a public highway which had been determined adversely to them. Upon the argument of said motion to strike, plaintiffs expressly disclaimed any intention to allege that the

place of the accident referred to in said amended complaint (being the roadway therein and in said second amended complaint referred to) was a public highway, and stated that the only intention of said first amended complaint and of said portions thereof sought to be stricken was to allege that the place of said accident (being [56] the roadway in question) was a roadway used by the defendant company's license, acquiescence, permission or invitation. Thereupon the Court denied said motion to strike upon the ground that said amended complaint did not intend to allege, and did not allege, that the place of said accident (being the roadway in question) was a public highway, but only a roadway used by the public by the defendant company's license, acquiesence, permission or invitation. Thereupon this defendant demurred to said amended complaint and said demurrer was, by the Court, sustained, and now by said second amended complaint filed by the plaintiffs herein, and by the several portions thereof hereby severally sought to be stricken therefrom, the plaintiffs again seek to charge and again seek to litigate that the crossing in question was a public highway by being regularly laid out, as such, by dedication and by estoppel and in other ways known to the law, and again allege and seek to litigate the question as to whether or not the said crossing referred to in said second amended complaint, and in the prior pleadings herein, was a public highway. By said action on the part of the plaintiffs hereinbefore recited, however, and by electing at said trial not to stand upon said ruling of the Court, and by electing

not to let said cause go to final judgment upon said ruling of the Court, and by electing not to have the said ruling of the Court reviewed, and by electing to abide by said ruling of the Court and to conform thereto, and by applying to said Court for leave to amend said complaint by striking out and abandoning the averments that said roadway in question was a public highway, and by applying to the Court for leave to amend said complaint by setting forth that said roadway was not a public highway, but a roadway used by the travelling public by the license, acquiescence, permission or invitation of said defendant company, the plaintiffs have conclusively elected that their remedy is not to allege, or seek to prove, that said accident referred to in said second amended complaint, and in said prior pleadings hereunder, occurred upon a public highway, or that the crossing in question was a public highway, and they have conclusively elected to abandon the theory that this action is based upon an alleged violation of duties said to have been owing by the defendant to persons upon a public highway, and by the facts aforesaid the plaintiffs have conclusively elected to proceed upon the theory that the roadway in question was a private roadway used by the travelling public by the license, acquiescence, permission and invitation of this defendant company, and not otherwise.

All of which said facts and proceedings more fully appear of record herein in the two bills of exceptions heretofore settled and filed herein, which are, by this reference, made a part of this motion as fully and to all intents and purposes as if incorporated

herein at length. But by said second amended complaint the plaintiffs now seek again to litigate the matters which, as aforesaid, have already been adversely determined against them, and which they have heretofore, as aforesaid, conclusively elected not to litigate, and which, as aforesaid, they have already conclusively elected to abandon, and which they are, by the facts aforesaid, conclusively estopped from asserting or litigating: that is to say: That the roadway in question was a public highway by proceedings being taken to lay out the same under the statute, by prescription, by dedication or by estoppel, or that the same was a public highway in any manner, or to any extent known to the law. [57]

The said motion as an entirety is, and each and every of said several motions herein embraced are each based upon the records and files herein, consisting of the plaintiffs' original complaint, the plaintiffs' first amended complaint, the defendant's motion to strike the same and portions thereof, the defendant's demurrer to said first amended complaint, the order overruling said demurrer, the order thereafter granting the plaintiffs leave to amend, the second amended complaint filed by the plaintiffs and this motion, and the two bills of exceptions heretofore filed herein by this defendant to the proceedings had upon the trial of said cause, and to the order denying said motion to strike said first amended complaint, and upon all the papers, facts,

matters and proceedings in said bills of exceptions set forth.

VEAZEY & VEAZEY,
Attorneys for Defendant Great Northern Railway Company. [58]

BE IT FURTHER REMEMBERED, that said motion was argued by counsel for the plaintiffs and by counsel for defendant, Great Northern Railway Company, and submitted to the Court for judgment and decision, and thereupon the Court overruled said motion to strike and the whole thereof, and each and every motion therein made by said defendant, Great Northern Railway Company, and, upon the argument of said motion, plaintiffs again disclaimed any intention to allege that the place of the accident was a public highway.

To which ruling of the Court, in overruling said motion in its entirety, and to each and every ruling of the Court in refusing to strike the said several portions of said complaint, as prayed for in said motion, the said defendant, Great Northern Railway Company, by its counsel, then and there duly excepted, and severally excepted as to the failure to strike out each of said several portions so sought to be stricken, which said exceptions were then and there duly noted and allowed, and are each hereby preserved.

AND, NOW, THEREFORE, in furtherance of justice, and that right may be done, the defendant, Great Northern Railway Company, presents the foregoing as and for its Bill of Exceptions in this cause, and prays that the same may be settled and

allowed, signed and certified by the Judge of the above-entitled court who presided at said cause when said rulings were made and said proceedings had, as provided by law.

VEAZEY & VEAZEY,
Attorneys for Defendant, Great Northern Railway Company. **[59]**

IT IS HEREBY STIPULATED by and between the parties, plaintiffs and the defendants (Great Northern Railway Company), in the above-entitled cause, that the foregoing Bill of Exceptions is true and correct, and that the same may be settled and allowed, signed and certified by the Judge of the above-entitled court who presided at said cause when said rulings were made and said proceedings had, as provided by law.

Dated, January 22d, 1913.

R. O. LUNKE, and
WALSH & NOLAN,
Attorneys for Plaintiffs.
VEAZEY & VEAZEY,
Attorneys for Defendant, Great Northern Railway Company. **[60]**

In the District Court of the United States, District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY (a Corporation), et al.,
Defendants.

Order Settling and Allowing Bill of Exceptions [to Ruling on Motion to Strike Certain Parts of Second Amended Complaint].

This cause coming on regularly before the Court this day to be heard upon the application of the defendant Great Northern Railway Company for the settling and allowance of its proposed Bill of Exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of court, and it appearing to the court that said Bill of Exceptions was duly served upon the plaintiffs by service upon their attorneys within ten days after the ruling in said bill referred to was made and that within ten days after such service and within the time allowed by law or rules of court for the service of amendments to said bill no amendments were served by the plaintiffs or their attorneys, and the matter of the settlement of said Bill of Exceptions coming on now regularly to be heard, IT IS NOW ORDERED: That the foregoing Bill of Exceptions be, and hereby is, declared to be a true Bill of Exceptions in said cause, and the same is hereby settled and allowed as a true Bill of Exceptions of said defendant railway company in said cause, and the same is now hereby certified accordingly to be such true Bill of Exceptions by the undersigned the presiding Judge of said court who tried said cause and who presided at said cause when the ruling therein referred to was made and the proceedings therein set forth were had, and it is ordered the same be filed and made a part of the record herein.

Dated this 15th day of Feb. 1913.

GEO. M. BOURQUIN,
United States District Judge.

Filed Feb. 15, 1913. Geo. W. Sproule, Clerk.

[61]

That on Jan. 10, 1913, an order denying motion to strike from second amended complaint was entered herein, as follows, to wit:

[Order Denying Motion to Strike from Second Amended Complaint.]

In the District Court of the United States in and for the District of Montana.

No. 960.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Herein, the motion to strike from the second amended complaint is denied.

January 10, 1913.

GEO. M. BOURQUIN,
Judge.

That on January 14, 1915, defendant railway company filed its Bill of Exceptions herein to the rulings made at the trial hereof, said Bill of Exceptions being in the words and figures following, to wit:

[62]

In the District Court of the United States in and for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Bill of Exceptions [to Rulings Made at the Trial].

BE IT REMEMBERED, That this cause came on regularly for trial upon the issues arising only between the plaintiffs and the defendant Great Northern Railway Company, set forth in the second amended complaint of the plaintiffs, the answer of the defendant Great Northern Railway Company thereto, and the reply of the plaintiffs to said answer, before the United States District Court for the District of Montana, on the 30th day of June, 1914, the Hon. George M. Bourquin, the Judge thereof, presiding, said cause having been discontinued by the plaintiffs as to the defendant, John Hamilton. Messrs. Walsh, Nolan & Scallon and R. O. Lunke, Esq., appeared as attorneys for the plaintiffs, and Messrs. Veazey & Veazey, as attorneys for the defendant Great Northern Railway

Company. A jury of twelve persons was duly and regularly impaneled and sworn to try said cause. Whereupon the following proceedings, and none other, were had, and the following evidence, and none other, was introduced, to wit:

[Testimony of Herbert L. Ennis, One of the Plaintiffs, for Plaintiffs.]

HERBERT L. ENNIS, one of the plaintiffs, being first duly sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

Q. Mr. Ennis, what is your name?

By Mr. VEAZEY.—We object to the introduction of any evidence in this case, upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

By the COURT.—The objection is overruled.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

I was born in 1850; am sixty-four years of age; live at the present time at Fairview, Montana. I am a dentist. In the spring of 1909 I lived near Bainville, Montana, about nine miles west of the eastern state line. That would be east of Culbertson. I was living on my homestead near Bainville. My family consisted of myself and my wife, living there together. I had a son living in Chicago. He had lived there seven, eight or nine years at that time—something **[63]** like that. My son was of age at that time.

(Testimony of Herbert L. Ennis.)

I think I had been living on the ranch about three years, and my wife had been living with me. She was forty-nine years old at the time of her death. Yes, sir, she was a woman of refinement. Yes, sir, she could play musical instruments. Yes, sir, my associations with her were companionable. Everything was pleasant. She had charge of the house, and looked after the business affairs of the house. Most of the work was done by her. Occasionally she had some help in some extra work. In the spring of 1909 I was away from home nights. I used to drive from the ranch to the office nearly every day. Sometimes I stayed there a day or two at a time, but I was at home most of the time. At that time I maintained an office at Mondak, about eight and a half miles east of my ranch. We were at that time in the process of proving up on the ranch.

I know of a roadway there going to Bainville. I first became acquainted with that road about three years prior to the accident, when I moved on the ranch there. At that time Bainville, or rather new Bainville, was about three miles west of my ranch on the line of the railroad. The main line of the Great Northern Railway Company ran through that portion of the country. The railroad ran right along the west side of my place there. I should judge that the road ran north from my house, probably one hundred and fifty or two hundred rods, and then crossed the track and followed the railroad track on the west side to Bainville. The road ran

(Testimony of Herbert L. Ennis.)

from my place west to Bainville, and from my place southeast to Mondak. Yes, sir, it was the road that was traveled by the public generally, as it went through the country there. Mondak was at one end and Bainville at the other—a distance of about ten and a half or eleven miles between the two. At Mondak the road connected with the road coming through Buford along down the railroad track to Williston, North Dakota. This road takes you into Mondak and then you can take any road you see fit. On the other hand, when you go to Bainville on this road, you could take a road out of Bainville to Culbertson. The road thus continues along there, going right through the country and doesn't stop. [64*—2†]

At the time of the accident in April, 1909, I had been familiar with that road for four or five years. I lived there three years. I used it myself. It was the only way I could get out and go to Bainville from the east side of the track to the west side of the track crossing the railroad. Yes, sir, it was used by others who traveled through the country there. The plat which you show me is correct. It is a very good diagram.

Thereupon said plat was marked "Plaintiffs' Exhibit 1," and was offered and received in evidence without objection, and is by this reference made a part of this bill of exceptions.

Those red lines on the plat represent the driveway

*Page-number appearing at foot of page of original certified Record.
†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of Herbert L. Ennis.)

from my place to Bainville. My place is at the east end of the red line. My house is on the east side of the track. It is marked the "Ennis house." We go from the house up to this crossing here. Then there is a road also which extends across the creek and goes east from there. The red parallel lines represent the driveway—the roadway that I have been speaking about. The railroad is represented on the plat by a single dotted line. This outside line, running along parallel with the dotted line, is intended to show the railroad fence. It is a road and so marked.

In going from my place to New Bainville we leave the house there and come up here to the crossing, as shown on the plat. We cross the corner there and then take the west side of the track and then follow the track to new Bainville. Those red lines also lead up to the road that crosses to the Central Security barn there, and from there on the drive extends on up to new Bainville. It is marked there.

When I first came there the crossing of the railroad track was directly west of my house, probably thirty rods west of my house. Then that crossing, after I located there, was closed and changed, and put up where the accident happened later. Before the time of the accident the crossing had been used at the point of the accident about two and a half or three years—probably two years and eight months. There were no bridges on this road from my house up to the Central **[65—3]** Security barn, but west on there to Bainville there were culverts that were

(Testimony of Herbert L. Ennis.)

put in and bridges. I saw county officials around that bridge during the time it was being put up. I saw the county commissioners there and the road supervisor. That was a very crude crossing there at first, but there were boxes put in on either side of the track, three and a half or four feet square, to conduct water from a big cut east of there down through into the creek, and then it was graded up over those boxes. I am referring to the crossing on the right of way of the railroad. The county road boss was there doing the work up to the approaches to the railroad track. I saw the county men working on the approaches to the road there, and the railroad men putting in the planking between the rails where the drive road crossed the track. The railroad company also banked it on the inside of the driveway. They also have a sign up there, "Railroad Crossing." I was present when these pictures were taken showing that sign. I was then with the photographer. Plaintiffs' Exhibit 2 correctly shows the crossing and the crossing sign. The crossing sign is right between the two poles and is marked, "Railroad Crossing."

Thereupon the said exhibit was offered and received in evidence, and is by this reference made a part of this Bill of Exceptions.

That photograph was taken probably three or four weeks after the accident. The fences on the east side of the road crossing are probably thirty feet from the road, and on the west a little further. I should judge that about sixty-five to seventy feet

(Testimony of Herbert L. Ennis.)

was the space between the fences on each side of the road where it crossed the track. The cattle-guards were placed right in where the fence came to the track. The cattle-guards were on each side, on the east and on the west.

During the time that I lived there and used this road, I saw work being done on it. I saw the road supervisor doing work on this road. I saw the railroad men fixing the approaches to the railroad track on the driveway across the railroad track. At different times I saw men working on the track there and on these planks. They **[66—4]** maintained the crossing. By they, I mean the railroad-men, the section-men.

About the time of the accident I had a man by the name of Bigelow working for me. He had been working for me prior to the accident in the neighborhood of six months. During that period he had been doing general farm work, team, and taking care of stock. At that time I had a team that was afterward used when the runaway occurred. I should judge that I had owned that team somewhere from about four to six weeks. Before that I had seen the team at Poplar, probably half a year prior to that time. During the time that I had the team myself I drove them a good deal myself. They were handled by Mr. Bigelow or anyone around the ranch. Anybody might drive them, and my wife drove them after she came home. They were well broken. Yes, sir, very well broken. As to whether or not they were gentle or not, I certainly wouldn't

(Testimony of Herbert L. Ennis.)

have let her drive them if they had not been gentle, if I had not considered them gentle. From my observation of this man Bigelow, he was a very good horseman.

It was right around the first of January, 1909, I learned of the existence of a carcass of a horse in the neighborhood of this crossing. When I first saw it, it was burned. It lay alongside of the track, I should judge about twenty-five feet from the track and from the rails, on the west side of the rails and east of the driveway which crossed the railroad track. It was inside the fencing of the crossing. I think the original right of way was one hundred feet on each side of the track. The carcass was inside the two fences leading from the outer right of way fences to the track. It was inside the fences leading to the track and it lay within about twenty or twenty-five feet of the rails.

I know Mr. Hamilton, one of the defendants. He was the section-boss on that portion of the road. I saw Mr. Hamilton pile ties on it and set it afire to burn it within three or four days after the carcass was first there. That would be right near the last of December or the first of January. The section-men were with him when **[67—5]** he did this. The carcass was frozen, and this burning simply burned the hair off the carcass, and that is about all the burning accomplished.

As regards how frequently I saw the carcass after that until the day of the accident, I used to cross there frequently going to Bainville. I always saw it

(Testimony of Herbert L. Ennis.)

there except during the winter when it was covered with snow more or less. Sometimes it would be seen plainly and sometimes it would be buried in snow, so that it would be pretty hard to see it. I think the last time I went across there prior to the accident was Thursday evening, if I remember right. The accident happened on Sunday, the 18th of April. During the time that the carcass was there I drove there frequently back and forth, crossed there. I had been driving those horses back and forth for about four or five weeks.

In going across there, no, sir, I didn't have any trouble at any time. The team didn't spirit up, no, sir. Well, they always noticed that carcass there after it began to get warm weather, after the snow was melted off. About the first of April was the first time that I noticed that there was any smell from that carcass. It grew stronger as it grew later in the month. At that season up until the first of April it was pretty cool, because the warm weather came on later, and later grew perceptibly stronger. By the Thursday before the accident the dogs and coyotes had worked on that carcass during the winter in frozen weather, and had eaten up the upper portion of it. The under side of it laid on the ground. That was pretty nearly all intact. The bones held up there and the skin was on the head and back and shoulders. That was pretty near perfect. The upper ribs, as it looked to me, had been eaten off. The meat had been eaten off of that portion. The ribs were still attached to the backbone, and you

(Testimony of Herbert L. Ennis.)

could see space plainly between them. There was no connection between the ribs. The outer portion of the body had been eaten away and the lower portion as it lay on the ground, the major portion of it, was there yet. At the time of the accident the carcass was not far from the traveled road. It was somewhere in the neighborhood of **[68—6]** twelve or fourteen feet from the driveway on the right-hand side as you go towards my house from Bainville, or on the left-hand side as you go from my house towards Bainville.

I have had considerable experience in handling horses all my life. Yes, sir, I have handled horses on the range. Yes, sir, I have encountered carcasses on the range when I was handling horses. As to whether or not a carcass like that would have a tendency to frighten horses, it always does.

I first learned of the injury to my wife about four o'clock in the afternoon of Sunday, the day she was hurt. I last saw her on Friday morning. She was then well. On Sunday afternoon at four o'clock when I saw her she had been injured by this runaway, and was in bed. She was paralyzed and had internal injuries. She did not recover from those injuries before she died, and remained paralyzed until her death. She was hurt on Sunday and died on the 22d, four days later.

My wife did the ordinary work of a wife around the house. She did the house work and looked after everything generally around the place. I would say she did a good deal of work. Yes, sir, she supervised

(Testimony of Herbert L. Ennis.)

the work of the men on the ranch—did that entirely. Yes, sir, she ran the ranch. She would have been forty-nine years old in December, after the accident. From a domestic servant standpoint, I would say that the labor and her services performed around the ranch would amount to at least five or six dollars a week. It could cost me that to hire a girl to do the house work. She died on the 22d of April at two o'clock in the afternoon. She never recovered the use of her limbs before she died.

Cross-examination.

There is nothing which has happened as the result of this accident which makes me feel that I cannot look back on the facts and give the jury an accurate account of what occurred, and as the result of the accident I am conscious of no bias against the railroad company. From my point of view it is merely a business suit between business men. [69—7]

My wife arrived at the ranch on Thursday evening from Chicago. She had been to Chicago on a visit, and got back on Thursday evening. She left for Chicago some time in December, or the latter part of November, about the twentieth of November of the preceding year, and she was away from the latter part of November up to Thursday, the fifteenth of April. She was visiting her son in Chicago. My son is between thirty-four and thirty-five. He has been working in the capacity of book work there in Chicago for ten years, from 1899 to 1910. He is independent and self-reliant. My wife used to make a visit down there to him every once a year or two

(Testimony of Herbert L. Ennis.)

years, just as it happened; sometimes in the summer, or later. I think this was the first visit she had ever made there after we settled on the ranch. That would be the first visit in three years, yes, sir. Prior to that she had been making visits to him every year or two. I would not go with her on these visits. I paid the expenses of those trips.

These red lines indicate the driveway. There was no fence along that road. It followed along the railroad fence. There was no fence, fencing the road from my place towards Mondak. The road was fenced across as you went through the farms. The main line of the Great Northern runs substantially east and west, but it curves near this crossing so that at the crossing it lays pretty nearly north and south. The crossing is right on the section line between Sections 11 and 12, and the crossing ran east and west. As soon as you get across that crossing going east there was a fence there with a gate in it, just beyond where the accident happened, and you couldn't go along on that road easterly without opening that gate. So also, as regards going into my ranch. You would have to open a gate. There was a gate across the road as soon as you got across the track, which would have to be opened in order to go easterly, and there was also a gate across the road in the fences at right angles to this gate, which would have to be opened to get to my place. The road, after crossing the railroad track, immediately ran up against the gates into the ranches, including my ranch. It went through the Hanson and then on to my ranch, and so down to

(Testimony of Herbert L. Ennis.)

Mondak, and along that [70—8] road there were gates all the way that you had to open when using that road. I spoke of that road as the main traveled road between Bainville and Mondak. There was a road west of my place, about two or three miles west of me; it ran from Bainville to Mondak. There were gates on that. In that country you can go anywhere, and the road was not fenced up. It is a new country. That other road was a main traveled road. Both of them were traveled by the public. There were obstructions in each all the way.

Q. What other road was there leading from your ranch to Bainville? A. None whatever.

Q. No other road?

A. Unless I went—well, I would go three or four miles north of Bainville and then go east three or four miles, and then come on the east side of my place.

Q. Wasn't there another road by which you could reach your ranch from Bainville?

A. From Bainville.

Q. That would involve a trip of a mile or two miles? A. No, sir.

Q. You would estimate that excess distance now at about six miles? A. Sir?

Q. You would estimate the distance at about six miles extra that you would have to go over the other road that you referred to leading to your ranch?

A. No, I wouldn't think that would be that much, probably four and a half or five miles.

Q. Do you remember on the previous trial being

(Testimony of Herbert L. Ennis.)

asked this question, and giving this answer? "Q. Was there a road extending about three-quarters of a mile from the railroad track northeast of the old Bainville station, which turned to go into your ranch, or from which a road led to your ranch? A. I could by making a trip through from, say, Lundquist's barn there, and going north of his barn, and [71—9] going north of his barn there around that way to his ranch, I could have gotten around there by going about two miles and a half or three miles." Do you remember that testimony?

A. I don't remember it, but it is practically all right in certain times of the year; but on account of high water or anything like that it would be impossible to get across the road on account of the creek. There is not a bridge there, and under favorable conditions we could get across that way.

My testimony at the previous trial was that I could have gotten around there by going about two and a half miles or three miles further.

Hamilton was the foreman there. Anderson was the road master. I knew them both prior to the accident for some time, for two or three years. I knew the agent at Bainville at that time, yes, sir. He lived right there at old Bainville, which was then about sixty rods from where this crossing was. That was where the old town was before it was moved up.

Friday morning was the last time I saw my wife. She had come there Thursday afternoon. I went after her the Wednesday preceding—Wednesday night—I expected her that night and she did not

(Testimony of Herbert L. Ennis.)

come, and Thursday night I think Bigelow went and got her. He drove her to the ranch and she was around the ranch with me until the following morning—Friday. I stayed there that night and left about eight o'clock the next morning. When I crossed the river the ferry-boat broke down and I was unable to get back across until Sunday afternoon.

I gave my wife no warning of the presence of that carcass there. If I had thought that that carcass being there would be an object likely to frighten that team to such an extent that it would run away, yes, sir, of course, I would have warned my wife.

The carcass was first found there towards the end of December or the beginning of January, 1909. I do not know of my own knowledge how it came there. I do not know whether the railroad company placed it there or somebody else placed it there, or whether it rested there by reason of some accident. I had been over that [72—10] crossing for two or three times a week on an average all the time the carcass was there. I noticed the effect of this carcass on the team. The team would notice this carcass when we crossed there. As regards whether I noticed that the carcass scared the horses along about the first of April, about the first of April the horses called my attention to it. The effect of that carcass upon the horses was that they would notice it and turn their heads toward it, but I always managed to get them across there. There always had been trouble. I would describe the carcass of an animal resting on the ground as a horse scarer.

(Testimony of Herbert L. Ennis.)

According to my testimony at the last trial, I had a stallion there that did not care to go across there at all. I could hardly get some horses across there at all. That was true always while the carcass was there when it was first killed. That was true at any time. We had a very big, powerful horse, not very well broken.

After the first of April I probably crossed there with that team three or four times. I never made any complaint to the railroad company or its employees of the existence of this carcass. I made no complaint to anyone. Prior to the accident I did not discuss with John Bigelow the effect of the carcass on the horses. I did not talk with him at all prior to the accident about my horses being skittish of the carcass.

Q. Do you remember testifying at the last trial as follows: "Q. Had you ever prior to the accident discussed with John Bigelow the effect of this carcass on the horses? A. Have I ever discussed it with him? Q. Had you ever, prior to the accident, discussed with John Bigelow the effect of this carcass on the horses? A. Why, I had spoken of the horses being skittish at it. We would talk that over."

A. In a way, we may have spoken about it there, about the horses noticing this carcass, and no doubt we did.

Q. And you talked it over?

A. I presume we did. After it began to smell there, I talked it over with him. [73—11]

Q. Do you remember being asked this question and

(Testimony of Herbert L. Ennis.)

making this answer: "Q. You had talked with him about the horses being skittish at this carcass and you told him your experience, about this team having been frightened, so that he knew at the time he was driving across that crossing that the horses would be frightened at this carcass, did he not? A. Certainly."

A. I don't remember my answer. That is four or five years ago. That is a long time to remember those things. It is a long time to remember these things that come up in the ordinary conversation between a man and myself.

We talked in a way as anybody would have talked with a man about those things. He knew that the carcass was there, and I knew that it was there. Certainly he knew the effect of the carcass upon the horses. No, sir, I did not warn him at any time about the horses and not driving across there. I considered him a competent horseman to drive a team.

Q. Why didn't you warn your wife of the presence of this carcass? A. Why did I not?

Q. Yes. A. I never thought of it.

As to whether the only reason why I never warned my wife of the presence of this carcass was because I never thought of it—why she was only home from Thursday night, and I had other things to talk about, and probably had other things on my mind. I only saw her Thursday evening at dark until Friday morning at breakfast. I didn't think of the carcass or anything about it. My wife was at home and we

(Testimony of Herbert L. Ennis.)

talked about other things. I don't remember what other things I had to occupy my mind. I don't remember whether, at the last trial, that I gave as a reason why I didn't warn her that I had other things on my mind. I don't know what my answer was at the last trial. I know I had it on my mind that I had to cross the river the next morning after she got there, and I went. As to whether I would have anything on my mind, other than my business, the business of running my ranch and my [74—12] dental work, I don't know anything about that. Yes, sir, I testified at the last trial as follows: "Q. What did you have on your mind? A. My work and my business. Q. What was your work and your business? A. Well, my farm work there and my dental business, and I had too much on my mind to tell a man."

I didn't keep any books as to what I approximately spent annually on an average for clothing for my wife. I don't remember whether I estimated it for you at the last trial or not. I usually gave her what was necessary for wearing apparel and for her own expenses. She had what was necessary for wearing apparel and anything she needed. I cannot state on an average how much I spent for clothing a year. I should judge probably two hundred and fifty or three hundred dollars. Yes, sir, she had everything she needed. I would say it was something like three hundred and fifty or four hundred dollars. I did not take trips with her annually; I didn't have the time. We went to different places occasionally. I would judge that I spent for her benefit for vacation pur-

(Testimony of Herbert L. Ennis.)
poses two hundred and fifty to three hundred dollars a year. That would not be in addition to clothing. I would not say that I spent for her on vacation expenses about one hundred dollars unless it was on traveling expenses or something of that kind when she was away from home. We will say it would amount to about one hundred dollars a year. I estimated at the last trial that it would cost about twenty-five dollars a year for literature and things of that sort that I bought for her. Probably more than that. We always had plenty of reading matter and things of that kind and music that we enjoyed.

I am not a traveling dentist. I have not been such for the last ten or fifteen years. I have always maintained an office. I had an office at Mondak for six years. I was going across the river on other business not connected with my profession.

I had confidence in Bigelow, the driver, yes, sir. I knew he drank, yes, sir. As to whether I knew that he drank heavily, he never did when he worked for me. He was working for me about six months. I had known him probably a year prior to that. As to whether I knew that [**75—13**] his general character may be described as a heavy drinking man, he was a man that drank occasionally.

By the COURT.—(Interrupting and without any objection by counsel for the plaintiffs.) Have you any plea of contributory negligence in here?

By Mr. VEAZEY.—Yes, sir.

By the COURT.—If you have no issue based on

(Testimony of Herbert L. Ennis.)

this I cannot see that it is competent, and worth while going into.

By Mr. VEAZEY.—There is an issue on intoxication of the driver in connection with the accident.

By the COURT.—Very well, proceed.

Q. Don't you know the instances yourself where Bigelow was drunk? A. Yes, sir.

Q. Now, what instance do you know of in that connection? Tell it to the jury, will you?

A. Well, one time he went up there with a saddle horse to Bainville. I don't know from my own knowledge that he was drunk then, though I would think he was.

Col. NOLAN.—I object to that. The question is whether he knows whether he was under the influence of liquor at the time, and whether it contributed to the injury complained of. This testimony is incompetent, irrelevant and immaterial.

By the COURT.—Yes, I will sustain the objection.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon noted and allowed.

By Mr. VEAZEY.—We offer to prove by this witness now on the stand that he knew that the driver Bigelow, prior to the accident, was a man given to the habitual use of intoxicating liquors to excess.

By Col. NOLAN.—I object to that, unless it is shown in that connection that he was incapacitated at the time in question by drunkenness.

By Mr. VEAZEY.—We disclaim any intention of proving by this [76—14] witness that he was in-

(Testimony of Herbert L. Ennis.)
toxicated at the time, but we offer this testimony to prove his habitual intoxication and to disprove the assertion of the witness that he had confidence in the driver Bigelow.

By the COURT.—I will sustain the objection. There is no issue framed on this as the Court sees it, and it is improper cross-examination.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

I was born April 22d, 1850. Since the accident for two years I have been unable to do anything. I was taken with an attack of infantile paralysis.

I knew George Anderson, the roadmaster of the Great Northern and the section foreman, Mr. Hamilton. At the time of the accident they were respectively roadmaster and section foreman, concerning the section where this particular crossing was.

Redirect Examination.

Yes, sir, my wife helped make expenses and kept hens. Yes, sir, she put up eatables around the house, preserves and things of that kind. Yes, sir, out of her hens and fowls that she handled, she made more than enough to pay her expenses and clothing. She was able to play musical instruments for my edification and enjoyment.

There was not to my knowledge any road going from Bainville to Mondak, without a fence across it. This gate on the road in question leading to the Hanson ranch and my ranch was about one hundred and fifty to two hundred feet from the house. This was

(Testimony of Herbert L. Ennis.)

the main road as it existed there and it ran through my place on the west side of it.

By Col. NOLAN.—Now, at this time, if the Court please, I will read the transcript of the testimony of the driver Bigelow, given on the former trial of this case.

Thereupon it was stipulated between the parties that the driver Bigelow was not now in the State of Montana, and was probably in the State of South Dakota, and that the transcript was a true transcript of what the witness Bigelow testified to at the former trial. [77—15]

Thereupon counsel for the plaintiffs offered to read said transcript of the testimony of said driver Bigelow, but the defendant objected thereto, on the ground that the testimony constitutes mere hearsay, and the witness himself must be called, and the inability to call him has not been sufficiently established, and on the further ground that at the time of the examination of the witness Bigelow at the last trial the defendant did not have impeaching testimony, and accordingly the witness was asked in the course of his examination in regard to impeaching testimony for the purpose of ascertaining whether any impeaching testimony would be available, and whether he would admit that impeaching testimony existed; but since the last trial the defendant has secured impeaching testimony and also upon the ground that the testimony of the witness as disclosed in the transcript is too unintelligible and uncertain to be understood, in that the witness referred in his testimony to a plat,

(Testimony of Herbert L. Ennis.)

and indicated the places referred to on the plat by such expressions as "here" and "there," pointing to the plat, and the meaning of such references are now lost.

Which objections were by the Court overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Thereupon counsel for the plaintiffs read to the jury the transcript of the testimony of the witness, John L. Bigelow, called and sworn as a witness on behalf of the plaintiffs at the last trial, as follows:

My name is John L. Bigelow. I am thirty-four years of age. I was in the employ of Mr. Ennis during the year 1909, some time about the last of March. I should judge I had been working for him very near a month before the accident, which occurred in April. I have lived in the neighborhood of that crossing up there about three or four years. Before that I was living at Bainville. I have lived in the neighborhood of Bainville about twelve years. Bainville would be about three miles from this crossing.

My business has been just all round workman there on the range a number of years. I have broken horses ever since I was big [78—16] enough to go out and handle them.

I have known this road crossing extending from the crossing there either way about three years. I did not know it before that. I would say two and a half years; I could not say exactly. I did not live

(Testimony of Herbert L. Ennis.)

either at old Bainville or new Bainville during the eleven or twelve years that I spoke of. I was working on ranches around through the country. For three years I lived in the neighborhood of this road. I went along through the country there before it was settled up—when there was nothing but just a trail through the country at that time. That road as it goes through there goes in past Mr. Ennis' place and on through. I traveled it two or three different times clear to Mondak. It was just a road through the country from one place to another through the country, and you would open gates. As regards where people traveled along there to go across from Mondak, there is a different road south from Bainville.

It would be pretty hard to say who uses this Ennis road. I know of people traveling along there, other than people on the Ennis ranch. During the past three years it has been the main road. It has been used by people from all around the country there. I could not fix it in miles very well. I have known of people from Mondak using that road. Mondak is fifteen miles from there. This country along on the side of the track there where Ennis lives in the direction of Mondak is not very thickly settled but the land is all taken up. The people there get their mail at Lakeside and at Bainville, and in going to Bainville from that portion of the country the people in this vicinity travel this road across the railroad there. As the road crossed the track in April, 1909, I think there was a crossing made between the tracks.

(Testimony of Herbert L. Ennis.)

There was a sign "Railroad Crossing—Lookout for the Cars." There were cattle-guards on the track on either side of the crossing, and there were fences extending from the cattle-guards back to the fences that ran along the line of the track.

I first saw the team that I had on the day of the accident about a month before that. It was just a mile this side of Culbertson. They were in the possession of Harry Cain for one, and I don't remember [79—17] the other fellow's name. At the time I went to work for Dr. Ennis he did not have the team then, but got them shortly afterward. During the time that I was with Dr. Ennis up to the time of the accident, I handled the team most of the time. I used them almost every day. As to whether or not the team was gentle or tractable, to my knowledge or in my judgment, they seemed to be as gentle as kittens. I hitched the team up on Sunday, and drove Mrs. Ennis to Bainville. I should judge it was about eleven o'clock when we started.

I first saw this carcass that caused the runaway in March. It was then just like any dead animal—the bones were there and part of the flesh. It was there on Sunday when I went to Bainville with Mrs. Ennis. As regards what its condition was then or whether it emitted any odor or not, well, I think it did. Yes, sir, I know it did. No, sir, I don't think there was any odor emitted by it in March when I saw it. As to whether in the month of April the odor was noticable and strong, or whether it was simply slight, it was not very strong, but there was an odor there.

(Testimony of Herbert L. Ennis.)

When I was driving by there on Sunday, going to Bainville, I did not have any trouble going up with the team in going by the carcass. They shied out a little from it going up there.

As regards whether there is any difference, in so far as my ability to see the carcass is concerned in driving towards Bainville, as distinguished from coming from Bainville and towards the Ennis ranch, there is more of an object, and therefore it is easier to see it coming from Bainville. I had no trouble with the team when going to Bainville or about it shying that I spoke of.

In coming back we took the traveled road right by the railroad track. We left that road just at the Security Ranch and went to Miss Hanson's place. We went to Miss Hanson's instead of going along the road because the road by Miss Hanson's is a better thoroughfare. We stayed at Miss Hanson's just a few moments. Neither Mrs. Ennis nor myself alighted from the buggy.

As regards what took place after that, well, after we left Miss Hanson's place we drove down the road and there is a little **[80—18]** incline there. After we got down that we drove along for a little ways and a little piece of paper blowed in front of the horses and they kind of shied around it, and I got them settled down and going along as pleasant as any time —as any team could. And after you come there you get on another little incline and there was a steep rise right up just inside of this gate (indicating) and these other ridges (indicating) lies along the rail-

(Testimony of Herbert L. Ennis.)
road track and you can see this carcass shoot up that way (indicating), and then it is down again and up to another incline, and then on to the railroad track and then upon the other side. There was an approach on each side and just barely room enough for a buggy to cross it, and no chance to hold a team or anything else because you could not seesaw or do anything else with them.

After I got through the gate I had the team back in its normal condition and then we went to the crest of a little hill. That is where they saw the carcass, just as they come up over this raise (indicating). The wind was blowing from the southeast. The odor was noticeable in the morning going up, and I was watching my team when I got there so as not to let them scare. I had a tight hold on the lines there, using every precaution I could not to have them scare. On the crest of the hill there, and when the carcass came in sight they just made one lunge and shied around, and I pulled them back to the road and crossed the railroad track and they were running. Yes, sir, they were running very fast. I was not able to hold them, because I had no control over them at all. There was a thirty-foot bank right there and down over, and I had no chance to do anything, because it would be just like driving a team right along here (illustrating). Mrs. Ennis and I were still in the buggy. After I got across the railroad track with the team running in this way, I could not keep right ahead because the gate was fastened up. As to what it was that I then did

(Testimony of Herbert L. Ennis.)

there, and why I did it, the fences came up just like this (illustrating) or like this (illustrating). This corner would be right here (illustrating), and I had to steer my team to the corner of the fence. The gates were closed and I had no chance to do anything else except go right through **[81—19]** the fence, and I thought by steering them to this post I might stop them, and I could not go turning around the other way because of this creek going there with a thirty-foot embankment. There was no public bridge across the creek. The team hit this fence and upset the rig and throwed me through the fence and throwed Mrs. Ennis just to the edge of the fence, and she rolled in under the fence and left our buggy upset there. The team became detached from the buggy, yes, sir. I was hanging on to the lines this way (illustrating) with one hand and when I seen her laying there I let the team loose and ran over to her and asked her if she was hurt, and she said yes. She was unconscious at that time and could not move. She says, "Please loosen my clothes," and then I run up to Miss Hanson's house and got her down at once.

Cross-examination.

That spring I had driven by that crossing once or twice a week from sometime in March, when I went to work for Dr. Ennis. The first time I went across that crossing I had one of Mr. Lundquist's livery horses. I crossed with these horses concerned in this accident prior to the day of the accident. I used all horses. These were driven as much as any.

(Testimony of Herbert L. Ennis.)

I used these horses most of the time in driving over that crossing or in any light work.

As regards what effect I had noticed was produced by the carcass upon the horses during this period from time to time, or what they did at the crossing during this period, why, they would shy a little was all. That was all they did prior to the day of the accident. I did not expect as I approached this spot immediately prior to the accident that I was going to have a runaway. Q. You did not expect that the carcass would frighten the horses to such an extent that they would run away, did you? A. Yes, sir, I knew that they would be frightened, and I had a tight hold on the lines, but I did not expect no runaway, because I thought I was strong enough to hold them. No, sir, I did not expect those horses, as I approached that crossing immediately prior to the accident, to be frightened to such an extent that I would lose control over them. A carcass of a horse is an object which is likely to frighten a horse to such an extent that he will run away. Although it was an object likely **[82—20]** to frighten horses and cause them to run away I did not expect them to run away at this time, because I thought I was horseman enough to handle these horses.

After you get across the track there is a fence extending across about one hundred feet from the center of the track, and a gate to the south leading to the Ennis ranch, so that, after a person got across the track he could not get out of there except

(Testimony of Herbert L. Ennis.)

by opening that gate, or tearing down the fence. I had no room to turn. I couldn't turn. I turned out a little in order to hit this fence. I could not have turned the opposite way on account of the creek. It would not have been better if I had gone straight ahead and run into this wire. The buggy tipped over. The gate on the Hanson property would be somewhere in the neighborhood of one hundred to one hundred and twenty feet from the center of the track. Miss Hanson's house was about forty or forty-five rods from the gate which I opened on her property.

That piece of paper blew across the road between the house and the Hanson gate, about ten rods from the house. It just blew across the road, and went on down another part of the country. I did not open a gate on the Hanson property so as to get back on the road. The gate was not closed at all. The gate on the south or west side of the track was open. These horses took fright at this piece of paper like any ordinary horses, just kind of shied out to one side a little bit. I pulled them right up and they settled down and seemed to be as calm and cool as could be. It was not over two or three minutes that I took to calm them down and get them cool. It was about a minute until I had them down to a walk. I just pulled them down and got them on a walk.

As regards the road between Miss Hanson's house and the crossing, it comes up over a high bank there; that is, there is a creek down on this side of it (indicating), you see, and the road runs up

(Testimony of Herbert L. Ennis.)

over the hill, and I used it because it was a better road to travel. The other road goes down through those creeks. There is a hill in there just as you come up out of this creek and turn to go on the crossing. There is also a hill just before the Bainville road makes **[83—21]** that turn, just as you come up out of this creek. There is quite a little dip; I should judge about twelve feet. The Hanson road joins the Bainville road just about at that dip. You see you would be coming up this way (illustrating) and this other road runs right along here on the brow. It is a level road. The Hanson road joins the Bainville road on the top of that dip. The Hanson road joins the Bainville road at the Security Ranch. After you leave the Bainville road at the Security Ranch and go along the Hanson road the Hanson road then joins the Bainville road at the top of that little dip just as you come on the bank out of this dip. The Hanson road from the point where it leaves the old Bainville road near the Security Ranch to the point where it again joins the Bainville road has a little hill in there—not much of a one. That hill is about thirty or forty rods from where it starts in at the bank there where you come up the bank of the creek. I don't mean thirty rods from the point where it joins the Central Security Ranch. The foot of the hill to which I have reference on the Hanson road is about twenty-five rods westerly from the point where the Hanson road joins the Bainville road near the crossing. I should judge it would be about two rods from the foot of

(Testimony of Herbert L. Ennis.)

the hill to the top of the hill, so that from the intersection of the Hanson road with the Bainville road near the crossing, the bottom of the hill would be about twenty-five rods distant, and the top of the hill would be about two rods further, measured along the road.

This piece of paper blew across the road just after we were leaving Miss Hanson's house, just after we got where we started down this hill, just after we started down from the top. As regards whether that paper blew across my path at the top of the hill or the bottom of the hill, it would be just about the point of the hill starting down—just about at the top. I am sure about that. Those distances are correct to the best of my knowledge.

Yes, sir, I recall making some statement to the claim agent of the Great Northern Railway Company at Bainville on May 24th, 1909, in regard to this accident. As to whether I recall stating there that a small piece of paper on a bush fluttered considerably close to this [84—22] crossing, which frightened the team, and that this was at the bottom of the hill referred to, and that I just got the team quieted down when I reached the hill and approached the track, I would not say whether I said at the bottom of the hill or after we started down the hill. To the best of my knowledge it was just as we started down the hill. As to whether I recall stating that the piece of paper which frightened these horses simply fluttered on a bush—the paper was fluttering on a bush and blew across in front of

(Testimony of Herbert L. Ennis.)

the horses. As to whether I have testified to the effect that it was the blowing of the paper across our path that frightened them, well, it was fluttering there and then blew across. As regards which frightened them—the fluttering or the blowing across, it was the blowing across. The fluttering frightened them first and then the blowing across. A small piece of paper fluttering on the bush started them first.

As to whether a point twenty-seven rods from that crossing is close to the crossing, it is not a great ways away. I would understand that as meaning close to the crossing. That document bears my signature.

Thereupon there was offered and received in evidence a written statement, signed by the witness, and referred to in this testimony, reading as follows:

"A small piece of paper on a bush fluttered considerably close to this crossing, which frightened the team. This was about at the bottom of the hill referred to. I had just got the team quieted down when we reached the fill or approach to the track, and at that moment the wind blew the odor from the dead carcass right toward them, which frightened the team, so that they became unmanageable and ran away."

As to whether, as I approached this crossing I did not expect the horses to be frightened to such an extent that they would get beyond control, I had a tight hold on them in case—I thought I had control over them enough to hold them. No, as I approached this crossing I did not expect the horses to be frightened

(Testimony of Herbert L. Ennis.)

to such an extent that they would get beyond control.

No, sir, I had not been drinking any that day. As to whether I am a drinking man, yes, sir, I take a drink. I was not drinking intoxicating liquors prior to that time to excess. [85—23]

The remainder of said transcript of the testimony of the witness Bigelow, as given at the last trial, read as follows:

"Q. Do you remember at any time—or did you at any time state to anyone at any place that it was this piece of paper which caused this runaway, and not this carcass?

By General NOLAN.—I object to that. This is a witness in the case, and I suppose if there is some evidence it was made in some particular statement.

By the COURT.—Sustained.

By Mr. VEAZEY.—We are not laying the foundation for impeachment, but are inquiring for evidence.

By General NOLAN.—Well, then, if you are not, the testimony is incompetent. Of course, any statements made by this man would be hearsay, except in so far as this statement would be contradictory to anything he has said on the stand here.

By the COURT.—I will allow him to answer the question.

Q. Did you ever at any time or at any place make any statements to anyone to the effect that this runaway had been caused by the horses becoming frightened at the piece of paper, and not by the carcass? A. No, sir."

(Testimony of Herbert L. Ennis.)

Before the first question above set forth, beginning with the words, "Do you remember at any time, or did you at any time," etc., was read, counsel for the defendant advised the Court that defendant desired to withdraw said question, and to waive it, and advised the Court that if the witness were present, an impeaching question would be propounded, since impeaching testimony was not available, and defendant demanded that the witness be produced, in order that an impeaching question might be propounded, but the Court declined to allow said question to be withdrawn, or the answer thereto to be withdrawn. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon noted and allowed. And the Court likewise overruled the demand of the defendant that said witness be produced. To which ruling of the Court the defendant, by its [86—24] counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Likewise when that part of said transcript, containing the objection to said question and the Court's ruling sustaining the said objection, and the declaration by counsel for the defendant that defendant was not laying the foundation for impeachment, but was inquiring for impeaching evidence, was read, counsel for defendant advised the Court that defendant desired to withdraw said disclaimer that it was not laying the foundation for impeachment, and counsel stated that, at the time of the former trial, the defendant did not have any impeaching testimony, and

(Testimony of Herbert L. Ennis.)

was forced to inquire of the witness as to whether there was any, and could not call his attention to any particular statement or impeaching testimony, but that since then impeaching testimony had been procured, and defendant desired, therefor, to withdraw said disclaimer and to impeach the witness.

By the COURT.—The Court will not permit it. Now, we will hear what the witness has to say and bring that up later.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Thereupon, the testimony of said witness, as above set forth in said transcript was read to the jury.

[Testimony of H. L. Ennis, for Plaintiff (Recalled).]

H. L. ENNIS, being recalled, testified as follows:

Direct Examination.

After crossing the track and going from my place toward Bainville along the traveled road you turn at a sharp right angle and go down and follow along the railroad track, and right near where you turn and follow the railroad track you can turn and go straight up the hill toward Miss Hanson's. Miss Hanson's house is about forty rods from the railroad, and the road there goes up around the creek. There is a high cut bank which goes up around the creek, and this road goes up this bank and then back to where the old town of Bainville was. This road would extend from the crossing to a point to the south at an extreme distance of about forty-five rods, and then follows back to **[87—25]** the old road at

(Testimony of H. L. Ennis.)

the point where the old town of Bainville used to be. This road from Miss Hanson's house to the railroad track where they drove that Sunday is down quite a steep grade. Probably the railroad grade there is sixty feet lower than where her house is. It is sixty feet from her house down to the railroad track in that distance of forty rods.

After you cross the track from my place going to Bainville there are two roads by which you can reach Bainville—one road is towards Miss Hanson's house and the other turns at right angles to the crossing and follows the railroad track right along to Bainville. The two roads come together probably within twenty-five feet of the right of way fence. I don't think Miss Hanson's house is shown on the plat there. Yes (indicating) that is Miss Hanson's house (indicating a mark on the plat intended as a key to the plat). I have marked on the plat a line showing the road leading from Miss Hanson's house to the crossing (witness then marks on the plat a line from the crossing to a mark on the plat intended as a key showing the meaning of the mark on the plat, intended to indicate the Hanson house). The road from the Hanson house going down to the track was level for about five or six rods, and then you begin to break down hill. The gate that leads to the Hanson place is about twenty-five feet from where the two roads come together. There is an incline or depression beside the road where you break over in the right of way there, just before you come to the crossing in approaching the railroad track.

(Testimony of H. L. Ennis.)

There has been a big ditch there cut through, as I told you before, to let the water through from this cut. It is quite a drop down into the coulee; it was never graded out up there. This ditch is on the right of way of the railroad and runs parallel with the track and the road crosses it. In my judgment it would be forty or fifty feet from the railroad track. This photograph, Plaintiffs' Exhibit 3, shows the conditions of the right of way there. It shows you coming down the hill there, and it shows the break off into this ditch here right along here (indicating). Here is the crossing right there (indicating); that shows the ditch pretty plainly. The ditch and road are [88—26] shown in the photograph.

Thereupon said Plaintiffs' Exhibit 3, was offered and received in evidence without objection.

Plaintiffs' Exhibit 4 shows this big hill east of there, where the railroad comes through there, and slopes down from that on the west side to where they drove around. Plaintiffs' Exhibit 4 is taken about ten or twelve feet from the gate approaching the right of way.

Thereupon said Plaintiffs' Exhibit 4 was offered and received in evidence without objection.

The team shown in the picture is standing on the road coming down from the Hanson place.

Cross-examination.

I don't think the location of this house is indicated correctly on this plat, as I understand it. After examining the plat I now correctly locate the mark intended for Miss Hanson's house on the plat. The

(Testimony of H. L. Ennis.)

dotted road from the points "A" to "B" represents the road that passes the Hanson house, and not the other marks that I made. The dotted line from "A" to "B" was sketched on there at the time of the last trial. The Hanson road joins the Bainville road near where the old town used to be at the point "B." There was no gate there at all. The line which I sketched on in red in my direct examination, as the line showing the road from the crossing to the Hanson house, was on the wrong side of the track. You can just rub that out.

Thereupon the deposition of Mrs. Charles Allison, formerly Miss Alma Hanson, taken pursuant to stipulation hereinafter set forth, was read in evidence by the plaintiffs as follows:

[Deposition of Mrs. Charles Allison, for Plaintiff.]

Mrs. CHARLES ALLISON, being first duly sworn, testified in her direct examination by deposition, as follows:

Direct Examination.

I have been a resident of Valley County, at present Sheridan County, about nine years. I have known Dr. Ennis about eight years. I was acquainted with Mrs. Ennis in her lifetime. I was not present at the time of the accident in the month of April, 1909, but was [89—27] present a few minutes afterward. When I saw Mrs. Ennis she was right by the gate by the crossing. The crossing was just a few rods from my house. It was about three o'clock in the afternoon when I saw Mrs. Ennis. She was then conscious, but could not speak when I came down. Mr.

(Testimony of Mrs. Charles Allison.)

Bigelow, the driver, was with her there. I think he was the only one there when I went down there. Mr. Bigelow, the driver, first notified me. Mrs. Ennis was then just a few steps from the crossing; I should say about five feet. She was sitting on the telescope. I was with her all afternoon. She was then taken to her home about a quarter of a mile distant from the place of the accident.

I don't know how long this crossing had been there, where the accident happened. I am the owner of the land adjoining. Prior to the year 1908 I was the owner of the land on which a road was laid out, leading up to this crossing. I deeded that road or tract of land to the county for public road purposes. That road was used by people traveling to and fro through the country. I really don't know how long that road leading up to this crossing had been used for travel purposes up to the time of the accident—about two years anyway, in the least. I drove across that right of way where this crossing is, many times. I am not a good judge of distance, but I should say my house was about twelve rods from the crossing. There were cattle-guards on either side of the crossing. I don't remember whether there was any sign placed at the crossing, such as is usually used by the railroad company at railroad crossings, reading "Lookout for the cars!"

I was residing on my land during the winter and spring of 1909. While I resided there I noticed a dead carcass lying there that winter. I don't remember when I first noticed it. I know it was a horse,

(Testimony of Mrs. Charles Allison.)

and at the time of the accident had been there so long there was little left. I could not say how long. I crossed there almost every day. As regards how long prior to the accident I had occasion to cross this crossing and see this carcass, I crossed there almost every day. In crossing this crossing I noticed odor from the carcass. The odor emitted by the carcass was strong enough so that people crossing could notice it. The carcass was about three feet from the crossing where I [90—28] drove over it. The carcass was inside the fences maintained by the railway company. The carcass was about three feet from the rail, and about the same distance from the road. I don't remember just how long prior to the accident I had occasion to notice the odor from this carcass, but it was several weeks it was there. I did not notice the odor from this carcass when I was at my house, or too far away.

As regards whether I noticed the condition of Mr. Bigelow at the time he came up to the house to get me on that day, as to his being sober, or under the influence of liquor, he was perfectly sober as far as I could see. He was very much excited at the time he came to tell me about it.

I saw the team they were driving on that day. I knew this team and had occasion to ride behind this team prior to this accident. I think they were both bays. I drove behind the team with these parties. I drove with Dr. Ennis. The team seemed to be a gentle team. I do not think Mrs. Ennis ever used

(Testimony of Mrs. Charles Allison.)

this team. She came back shortly before the accident.

Cross-examination.

Thereupon, the defendant waived the cross-examination, but the plaintiffs insisted upon the reading of the same, and thereupon the defendant objected to the cross-examination being read in evidence under the stipulation, because, under the stipulation, the defendant had the right to waive the cross-examination, and did waive the same. When the deposition is offered at the trial and the defendant waives the cross-examination, it ceases to be cross-examination.

Which objection was by the Court overruled, and the plaintiffs were allowed to read the cross-examination in evidence. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed. Thereupon said cross-examination was read in evidence as follows:

I had known Mr. Bigelow before the accident for several years—I can't say how long. I did not notice any signs of intoxication on the occasion of the accident. I did not notice any signs of liquor of any sort. I could not say whether he is a drinking man. I don't know much [91—29] about it. As to whether I know his reputation in the community, as to whether he is a man who drinks considerably, and whether he drinks to excess, I don't know whether he drinks to excess. I have heard say he drinks some. I have not known of occasions when he has been un-

(Testimony of Mrs. Charles Allison.)

der the influence of liquor.

Thereupon, upon the defendant objecting to the following portion of said deposition, the same was first read to and passed upon by the court, to wit:

Q. Did Mrs. Ennis say anything to you at the time about his having had any liquor, or anything like that? A. No, she did not.

Q. Did she say anything after the accident about his having had any liquor? A. No, sir.

The defendant objected to said questions and answers, on the ground that the defendant had waived the cross-examination, and that therefore none of said cross-examination should be read in evidence, and in so far as the cross-examination has been admitted in evidence, this portion is a cross-examination as to a matter concerning which the defendant was forced to enter into, by reason of the improper questions asked in the direct examination, there being at the time the deposition was taken no one present who could rule on the competency of said testimony, and said questions in the cross-examination were asked merely for the purpose of developing anything that might have been said, or that is pretended to have been said by Mrs. Ennis, seeking to sound the reliability of the witness' testimony as regards the alleged conversations with Mrs. Ennis, and said cross-examination now becomes at most direct examination, and the portion referred to is hearsay and incompetent, and does not come within any exception to the hearsay rule.

Which said objection was by the Court overruled.

(Testimony of Mrs. Charles Allison.)

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

The carcass was about three feet from the rail and about three feet from the roadway. It was on the right-hand side of the road going [92—30] away from Bainville, and three feet from the wheel track in the road that would be nearest the animal. There were fences leading from, or near the rail, and away from the track. These fences were on each side of the road.

Mr. and Mrs. Flynn came by after the accident, and John Lundquist, and someone was with Mr. Lundquist, but I don't remember who he was. Also Miss Margaret Peterson, and Mr. Fred Swant. They came before we took Mrs. Ennis home—before we put her in the rig and took her home. Mrs. Ennis was conscious at that time. All the time she was there she was conscious. I stayed at the house until they took her to the doctor's, and she was conscious all the time she was there. I talked with her from time to time.

Q. And during those conversations did she say to you anything about Mr. Bigelow having been drinking that day?

Which said question was objected to for the reasons stated in the last objection.

Which said objection was by the Court overruled. To which ruling of the Court the defendant by its counsel then and there duly excepted; which said exception was thereupon duly noted and allowed.

A. No, sir, she did not.

I used this crossing almost every day. Sometimes

(Testimony of Mrs. Charles Allison.)

I would be driving and sometimes I walked across. I did not drive across very often. I drove both a horse and a team of horses. I noticed odor from the carcass when I drove across there, and the horses would always be frightened. As to whether, during the winter, coyotes and dogs had eaten up all the meat on the animal, and nothing but the bones were left, I would say there was nothing but the bones left at that time. I could not say the white bones; it had not been there quite that long. I would say just the bones were there. I would say that I crossed there while the carcass was there a dozen times and I noticed the odor of the animal every time I walked or drove across there. As to when was the first time that I drove across there and noticed the odor, or whether that was some time in the beginning of the year, I can't say because I don't remember. I know it was quite a while before that. I can't remember how **[93—31]** *how* many months the animal had been there. As regards approximating the number of months that I recollect that it was there during which I noticed the odor, and either drove or walked across there, I would say not more than two months.

I would say that my house is not more than twelve rods from that crossing. There are sixteen and a half feet to the rod.

Mrs. Ennis was in a critical condition all the time. She stopped at my house just before going over the crossing for about five minutes. She and Mr. Bigelow stopped just outside the house and talked with me only a few minutes. They did not go into the

(Testimony of Mrs. Charles Allison.)

house or get out of the buggy.

Thereupon the following questions and answers were first submitted to the Court for decision, as to whether they should be read in evidence, the defendant objecting to the same upon the same grounds hereinbefore set forth, and on the grounds that the same is hearsay, incompetent and irrelevant and immaterial, but said objections were by the Court overruled. To which ruling of the Court the defendant by its counsel then and there duly excepted; which said exception was thereupon duly noted and allowed. Thereupon said portion of said deposition was read in evidence to the jury as follows:

Q. There is nothing else you recall that would have any bearing on the accident, and no discussion you heard around Bainville as to Mr. Bigelow being responsible for the accident.

A. No, sir. I never have heard a great deal said about it.

Q. Have you heard any of these people, whose names you mentioned to us, refer to Mr. Bigelow as in any way responsible for the accident?

A. No, sir.

I saw the horses come by from the house, but I did not see them when they started to run away. These horses always picked up their feet. They were not slouchy. Their heads would be well up in the air. They were a good lively team. I never saw them shy at anything before. I should say they were ordinary western horses—about the same sort of horses that

(Testimony of Mrs. Charles Allison.)

I myself had been driving from time to time. [94—32]

Redirect Examination.

About five minutes elapsed from the time Mrs. Ennis talked to me at the house to the time Mr. Bigelow told me of the accident. I had just gone back in the house. Miss Peterson was staying with me. She went down to the track with me. She was present during the conversation I had with Mrs. Ennis.

Recross-examination.

Thereupon the defendant waived the recross-examination, but the plaintiffs insisted upon the same being read, and thereupon the defendant objected to the reading of the recross-examination, for the reasons heretofore stated, as regards the cross-examination. Under the stipulation the defendant has the right to waive the cross-examination, and the witness was cross-examined for the purposes heretofore stated.

Which said objection was by the Court overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

As regards whether the presence of that carcass there was a thing that would probably and ordinarily frighten a horse, or whether it was rather extraordinary, I would say that it did always frighten all horses I ever saw cross there. As to whether I would expect it to frighten horses to such an extent as to make them run away, I was always afraid to cross there. I never drove any horses. Someone else

(Testimony of Mrs. Charles Allison.)

drove them for me. They did not run away on those occasions. I know that anybody that crossed there had a hard time to hold their horses. If a man has been driving along a road and has been dragging something behind him, and it leaves an impression in the dust, a horse is apt to shy at that, and any time a horse shies at something, if he feels he has control for a minute, he is apt to run away. In a city, if a horse is driven through the street and someone should wheel a baby carriage with a fancy top, it is possible that a horse might shy at that and run away. It is not true that all these things may frighten a horse, but that it is not to be expected that they should frighten him to such an extent that he would run away. I think a carcass would frighten a horse more than some other things. If, as shown by experience, many [95—33] teams were driving across there, and did not run away, I would not think then that a carcass would frighten a horse more than anything else, and I would not think it was likely that a horse driven across there would be so frightened as to run away.

I was not surprised when I heard of this accident. I had not warned Mrs. Ennis to look out for that carcass. She was a warm friend of mine. As regards whether, if I thought she was going to encounter any danger that day, I would have warned her; I did not think of it at the time. I did not think that there was going to be a runaway, because Mr. Bigelow was a good driver. If I had anticipated that there was any possibility of the horses running

away because of that carcass, I would have warned her. As to the effect of the carcass frightening horses at all, or to such an extent that they would probably run away, I think they would run away, unless the driver was on the lookout, and takes good care of them so they don't. If the driver is on the lookout and takes proper care, they would run away in some cases just the same, but it would not be expected. I draw the distinction between possibilities and probabilities.

In a way I was surprised when I heard of this accident, but then I was not, because I rather expected there would be an accident there, because I knew so many had trouble in crossing.

Redirect Examination.

At the times I crossed there and saw people cross there, I noticed people had trouble. I can see that carcass from my place. I noticed previous to this time people crossing there had trouble with their horses. I was not surprised at the accident, because I had been looking for something of this kind to happen, because of the carcass being there. When Mrs. Ennis was talking with me I did not think to speak to her about this carcass, because I had not seen her for some time and did not think of it at that time.

[Deposition of Mrs. Katy Meinhardt, for Plaintiff.]

Thereupon the deposition of Mrs. KATY MEINHARDT, taken at the same time, and pursuant to the same stipulation aforesaid, was read in evidence, as follows: **[96—34]**

Direct Examination.

I reside at Bainville, and have been a resident there seven years next April. I knew Mrs. Ennis in her lifetime. I don't remember seeing Mrs. Ennis in Bainville in the month of April, 1909. I saw her on the day previous to the time she was injured. She came to my house and asked me to drive out to Hubeners with her. We drove to Hubeners that day, about a mile and a quarter from Bainville. The trip took about an hour and a half. I drove the team there. I think the team was a light bay team. I drove the team back from Hubeners. We were there about an hour and a half. The team was perfectly gentle. The team had halters on. We put the halters on and tied them out at Hubeners. I don't remember whether we drove the team in from Hubeners with the halters on. Mr. Bigelow was waiting for us when we got back to Bainville. As regards his condition that day, whether he was temperate or under the influence of liquor, he was perfectly sober. Mrs. Ennis and Mr. Bigelow on our arrival at Bainville then went right out home as they were expected for dinner. They left me at Bainville and started home. It was about two and a half hours after that, that I heard that Mrs.

(Testimony of Mrs. Katy Meinhardt.)

Ennis was hurt. I went down the following day to see Mrs. Ennis.

Cross-examination.

Thereupon the defendant waived the cross-examination, but the plaintiffs insisted upon the reading of the same, and the same objections were made as to the reading of the cross-examination of this witness by the plaintiffs, after the same had been waived by the defendant, as were made to the reading of the cross-examination of the witness Mrs. Charles Allison.

Said objections were by the Court overruled. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Thereupon said cross-examination was read as follows:

I have known Mr. Bigelow for six years. There were no signs whatever of intoxication on his part. There was no sign that he had been drinking at all during the time Mrs. Ennis was absent. We were **[97—35]** about an hour and a half on this trip to the Hubener ranch. Mrs. Ennis asked me to take her out there. We were at home. Mr. Bigelow and Mrs. Ennis drove up with the team to the door and I got right in and we drove to Hubeners. We did not see him afterward until we came back. That represented about an hour and a half. When we came back we did not see any sign that he had had intoxicating liquor. I do not know whether he was a drinking man or not. I do not know his reputation in the

(Testimony of Mrs. Katy Meinhardt.)

community as to whether he drinks to excess at any time. I have heard his general reputation is that he does drink to excess at times. I could not say this has occurred frequently here in Bainville. I have not heard so.

Redirect Examination.

I am assistant post-mistress here at Bainville.

Recross-examination.

Thereupon the defendant waived the reading of the recross-examination, but the plaintiffs insisted upon the reading of the same, and the defendant objected to the reading of the same for the reasons set forth in its objection to the reading of the cross-examination of the witness, Mrs. Charles Allison.

But the Court overruled said objection. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Thereupon said recross-examination was read as follows:

As to whether I have ever seen him myself when he was intoxicated, I have not seen him when he was too drunk to walk. Yes, sir, I have seen him when he was intoxicated, and I would rather not be with him. I have not seen him in that condition very often; maybe four or five times within a year or so. I have seen him in that condition about four or five times altogether. I did not see him very often. I do not mean four or five times in the course of a year, but during my acquaintance with him. I have known him six years. As regards making any explanation or

(Testimony of Mrs. Katy Meinhardt.)

correction as regards your understanding that I said that these occasions when this man was intoxicated to my knowledge occurred four or five times within a year, I understood you to say how often, and I said four or five times during the time I knew him. During **[98—36]** the last year previous to the accident I had not seen him four or five times when he was intoxicated. I would not say that I had seen him more than four or five times previous to the year of the accident that he had been intoxicated. Using my best judgment, during the time that I had known him I had not seen him under the influence more than four or five times.

Redirect Examination.

I saw him under the influence of liquor only four or five times in the time that I knew him, which is six years. Previous to the time of this accident I had know Mr. Bigelow only about two years. During that time I had seen Mr. Bigelow under the influence of liquor possibly twice. One of these occasions was when he came in the door when we were in a restaurant on the other side. That is one time in particular that I remember. The other time was either at a dance or in a store. On the day when I came back from Mr. Hubeners, and he took the team from me he was perfectly sober. As to how close I was to him, he took the lines from me as I stepped out of the buggy. If he had been drinking I would have noticed it and would have been able to detect the odor of liquor, yes, sir. I paid no particular attention to him except that he was perfectly sober and every-

(Testimony of Mrs. Katy Meinhardt.)

thing was all right. I have known Dr. and Mrs. Ennis about six years and am a warm personal friend of theirs.

[Deposition of R. H. Sweetman, for Plaintiffs.]

Thereupon the deposition of R. H. SWEETMAN, taken pursuant to said stipulation, at the same time and place, as a witness on behalf of the plaintiffs, was read in evidence, as follows:

Direct Examination.

I reside in Sheridan County, and have resided there now for seventeen years. I was acquainted with Herbert L. Ennis and with Mrs. Ennis in her lifetime. I know the crossing across the railroad track near the Ennis farm. I can't say just the years that that crossing was used by the public, but it has been several years—six or seven years I would say.

Q. You may state whether or not you know of your own knowledge that a public road was laid out leading up to this crossing, if [99—37] you know?

Mr. VEAZEY.—That is objected to on the ground that it calls for the conclusion of the witness as to what is a public road.

By the COURT.—As I understand it, there is no claim that it was a regular public road and laid out as such. The objection is overruled. It will be made clear to the jury, so that there will be no misunderstanding about it.

A. I could not tell just the time, but it has been several years—five or six years.

In driving from my farm at Lakeside to Bainville

(Testimony of R. H. Sweetman.)

I used this road and crossing about the year Mrs. Ennis was injured. I had occasion to cross there and travel this road during the winter preceding the death of Mrs. Ennis. In crossing the railroad and going to Bainville, I noticed an object lying there along the railroad track. That was a dead horse lying there. I could not give any dates when I first noticed that animal lying there. It was sometime during that winter though. I should judge it was two or three times that I crossed over there while that animal was lying there. I was driving at these times. In passing over that crossing my horses noticed this carcass, yes, sir. I can't say as I noticed any odor emitted from the carcass. It may have been, but I can't remember noticing it. As to whether or not I had any trouble with my horses in crossing, on account of this carcass, I had trouble with one team. I was coming from the opposite side of the track, and just as the horses got on the track they seen it and stopped on the track, and I had to whip them to get them over the track. I should judge that this carcass was lying from fifteen to fifty feet from the roadway. I could not say the exact distance. I did not pay enough attention to it. I should judge that the carcass lay with reference to the crossing some twenty or thirty feet from the railroad track. It might have been a little closer, or a little farther. During the winter preceding this accident, I think I made about two or three trips during the time the carcass was there. As regards the flesh being removed from the bones, it was partly gone, I think. When I first seen

(Testimony of R. H. Sweetman.)

it, it was pretty much all there, but towards the last it had been [100—38] partly eaten up, I think. I was not present at the time of the accident.

Cross-examination.

To the best of my recollection the road had been used six or seven years up to the present time (1914). I don't know how long before April, 1909, it had been used. Prior to the accident a good many people used it, driving across during that winter of 1909. I could not say about the time the carcass was first there. It might have been there three or four months prior to the accident. I didn't pay no particular attention as to the dates. I don't remember whether I noticed any odor or not.

I had no runaway while I drove across there. I do not know of any runaways that have occurred there, other than this one in question. When I drove across there I didn't think about whether my horses might notice it. My team stopped as soon as their heads came above the track. They stopped and commenced to shy. I was on the railroad track and I urged them across. I could not say whether that was the first or the last time that I had driven across there when I had trouble with my horses. It wasn't the first, I am pretty sure. I had either been across with the team or had seen it by walking up the track. When I drove across there I didn't think about any expectation of the horses running away. Whenever I approached that crossing I did not anticipate that my horses would probably run away.

When a horse approaches an object you can't al-

(Testimony of R. H. Sweetman.)

ways tell whether it is going to frighten the horse or not. As to whether I would except a horse ordinarily probably to be so frightened by seeing or smelling a carcass as to run away, I would say they often do. I never warned anybody about that carcass. I don't know that if I thought anybody was going to get into trouble at that crossing, either Mrs. Ennis or Dr. Ennis himself, that I would have warned them. At the time I did think it was a kind of a scarecrow there for a time. Still I did not think much about it. I think that such a carcass is likely to cause a runaway any time. As to whether a runaway was likely and probable, or possible and may happen, yes it happens. Well, someone is pretty likely [101—39] to have a runaway at a place like that. As to whether it was merely a possibility or a probability that their horses would be so frightened that they would run away, I would say that they are pretty apt to. Of course, they would not all do it. The only runaway I know of is the one in question. As to whether I know of any other instances where horses have had runaways by being frightened to such an extent by a carcass, I have known of a good many where they have been frightened at one thing or another. I don't remember of any instance other than this one where horses have been so frightened at a carcass as to run away. I have lived in the country seventeen years. I have ridden a good many horses that I could not get near a carcass, and I have driven a good many that I could not get near there. I have

(Testimony of R. H. Sweetman.)

ridden a good many horses you couldn't get close to a carcass.

I have had no claims of my own against the Great Northern. I have had claims when I was doing business for my brother.

Redirect Examination.

The railroad track at the crossing is higher than the land right east of it. You come up a little grade to come on to it. As to whether, coming from the east, going towards Bainville, a horse wouldn't be able to notice this carcass until he had nearly reached the railroad track, I think the horse would be able to notice it with his feet just up on the track. As well as I can remember there is a kind of gradual slope there. It must be some eight or ten feet, I think, probably more, that the railroad track is higher than the land lying around it, and I should say the slope extended back thirty or forty feet. I did not notice particularly, but I know there is a kind of approach there to get to the track. As you approach the track to the east you go down a little just where the dirt has been scraped out to grade up the track. I would say that the carcass was on the west side. It would be either on the west or south, but the way the track runs it would be on the south.

Recross-examination.

As to whether dogs and coyotes had eaten up the meat, and just bones were left, I think the hide and a good deal of it was there. Dogs and coyotes had eaten it some. [102—40]

[Deposition of Charley Johnson, for Plaintiffs.]

Thereupon the deposition of the witness CHARLEY JOHNSON, as a witness sworn on behalf of the plaintiffs, taken at the same time and place, and pursuant to the same stipulation, was read in evidence, as follows:

Direct Examination.

I reside five miles northwest of Bainville, and have been a resident of Sheridan County since 1898. I was acquainted with Dr. Ennis and I met Mrs. Ennis in her lifetime.

I know the crossing leading to the Ennis ranch. In 1908 I was road supervisor for the old Valley County of which Sheridan County is now a part. In the year 1908 I performed work and labor on the road leading to the crossing on the Ennis Ranch. It was done in July, 1908, I think, but I would not be positive. Work was done by me on the approaches leading to this railroad crossing. I also graded up the track. The work I did there at that crossing was dirt work, scraping, grading up. As the time I graded it up there was a crossing there, but not a very good one. There were planks laid there between the rails. I could not say positively whether there was any cattle-guard there. I am not positive there was any sign placed there calling attention to it as a railroad crossing. It seems to me there was, but I am not positive on that point.

Q. You may state whether or not, while filling in the approaches to this crossing, whether you had any talk with the railroad officials with reference to said crossing.

(Testimony of Charley Johnson.)

Which question was objected to by the defendant as calling for hearsay testimony, and it does not show that the declaration was made in the course of the duties of the alleged official.

Which objection was by the Court overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

A. I had a talk with Mr. George Anderson. I think he was the roadmaster on the Great Northern. He wanted to know if I would stand for the planks and charge them to the county. I said no, not unless the County Commissioners authorize me to do so, and I refused to do so, and [103—41] he said, "Well, here goes." That is all. That was the substance of the conversation. Planks were afterward put in. I did not put them in. I was not there when they were put in. This work which was done by me on the road during 1908 made the road passable, so that people could drive over it.

I was not present at the time of the accident, and all I know about this work is what was done by me as road supervisor down there.

[Deposition of Charles N. Bain, for Plaintiffs.]

Thereupon the deposition of CHARLES N. BAIN, taken at the same time and place, pursuant to the same stipulation, as a witness on the part of the plaintiffs, was read in evidence, as follows:

Direct Examination.

I reside at Bainville, and have been a resident of Sheridan County ever since it was formed, and of

(Testimony of Charles N. Bain.)

Valley County prior to the division of Valley County into Valley and Sheridan Counties, for fourteen years. I knew Dr. Ennis and was acquainted with his wife in her lifetime.

I know the land near the Ennis ranch, and have known it for about thirteen or fourteen years. I know the crossing lying west of the Ennis Ranch across the railroad track. That crossing has been used by the public in going back and forth over the railroad track about six years from this spring. I think that crossing was first put in in the year 1907. There was a road on the south side of the track leading to this crossing. I think that road was put in in the spring of 1907. At that time I was living part of the time down there, and part of the time here at Bainville. I could see this crossing plain from my house. During the winter and spring of 1909 I saw a horse lying close to this railroad crossing. I can't say exactly when the horse first appeared or lay near that crossing, but it was in the winter. I was along the railroad there quite often, and noticed the horse there during the winter. I can't say how long the horse laid there—it was some time.

In going back and forth over the crossing I noticed odor from this carcass in the spring when it thawed. It thawed in April. During the month of April, 1909, as regards whether any odor was emitted from the carcass, it smelled pretty strong. [104—42]

I noticed they tried to burn it, but they did not get it burned up. They tried to burn it before it was thawed out. I was not present, but I saw Mr. Ham-

(Testimony of Charles N. Bain.)

ilton, the section foreman, throw some ties on it and light it. This was before it got warm weather, because it was not thawed out yet. They tried to burn it, but could not burn it—it was frozen too hard. I saw they had a fire down there, and saw afterward where they charred it. At the time they were trying to burn up this carcass I was up there around the house about a quarter of a mile. You could not see the carcass from the house.

I have had considerable experience in handling horses. As to whether or not the smell of a carcass lying beside a crossing or road would have a tendency to frighten horses driven by that carcass, I would say yes, any kind of smell, or anything lying down will scare a team. I could not state how long prior to the time of the accident when Mrs. Ennis was killed, I had noticed odors coming from that carcass. Most any time I came along I could smell it.

Persons driving over this crossing from the east would not have to drive up much of an incline. On the west there was a little bit of upgrade there. In April, 1909, there was a fence east of the crossing. If a party were driving from Bainville and going to the Ennis Ranch, after crossing the railroad track, he would turn to the right and there was a wire fence and gate that you went through, which wire fence and gate was about three or four hundred feet from the crossing. You could not very handy cross the railroad track going from Bainville to the Ennis Ranch without going through this fence or gate.

(Testimony of Charles N. Bain.)

Cross-examination.

That gate led into Miss Hanson's land, and you had to go through Miss Hanson's land to reach the Ennis Ranch. Miss Hanson's land lay on the west side and on the east side of the track. This gate would be on the east side of the crossing. There was no gate leading to the Ennis Ranch, except Miss Hanson's gate. Miss Hanson's Ranch joined the Ennis Ranch, and I don't think there was any fence between them. It was all in one field.

As regards the burning of the carcass, I saw the men down [105—43] there and saw where they had been trying to burn it. I was not present at the time, and do not know what they did or tried to do, but it was there afterward.

I could not say when that carcass was killed. I think it was in the early part of the winter. During that spring and winter I used to drive across there every couple of days or so. When I went there I noticed the carcass. There was no smell till spring. I first noticed the smell when it thawed out in April, or the last of March, and when I crossed then I would notice the smell. During that period when I noticed the smell I crossed there a couple of times a week, and sometimes every day or so. I should judge that anyway in the last two weeks in March and the first in April I crossed there four times a week at the least, and during that period I noticed the smell. Coyotes and dogs had eaten the carcass some.

Redirect Examination.

This crossing and the grade leading up to it was

(Testimony of Charles N. Bain.)

pretty narrow. The country around there is rough. A person driving over this crossing with a team has not very much extra room or road on each side of him, in case the team went to one side, no, sir. I would say the width of the roadway was sixteen or eighteen feet. When you get off the road to the east it was up hill, because there is a bank there, but they cut it down some.

[Deposition of Fred Swant, for Plaintiffs.]

Thereupon the deposition of FRED SWANT, a witness called and sworn on behalf of the plaintiffs, taken at the same time and place and pursuant to the same stipulation, was read in evidence, as follows:

Direct Examination.

I live in Bainville, and have lived there three years. Before then I lived in Iowa. I was road supervisor over this road, but did not have anything to do with this road, as road supervisor. When I was road supervisor I had supervision over roads around Bainville. I know this road leading to the Ennis Ranch. I had some work done on that two years after the accident. At that time it crossed the track and ran east, something about three quarters of a mile, and then turned south, and immediately east of the track and a distance of twenty or twenty-five [106—44] feet there was a bridge there constructed by the county. I could not say how much it cost. It was supposed to be a county job. I think the county let the contract for the bridge to other parties and they put it in there. I did not see the County Commissioners around there when the bridge was being put

(Testimony of Fred Swant.)
up. I have no personal knowledge as to whether the county's finances were expended for the payment of the bridge.

J. E. Paradis was road supervisor before me, and Charley Johnson was road supervisor before him. Charley Johnson was road supervisor at the time of the accident in 1909. In April, 1909, I was living at the Security Ranch. I should judge that the Security Ranch was about sixty rods from this crossing. At the time there were planks at the crossing and fences and cattle-guards, indicating that there was a crossing there. There was a sign there, reading "Railroad Crossing." I don't know who put that up. I have seen such signals elsewhere where there were crossings. This did not differ in any particular from the other signals.

This road was traveled by the public while I was living there. By the public I mean any parties—different parties—that would be driving along the road. It was not simply a road that was there for the accommodation of Mr. Ennis and one or two others that had ranches there. There was other parties that crossed there. There were cattle-guards there. A cattle-guard is an obstruction. It is not an obstruction higher than a railroad track, but it is something that would scare cattle—keep cattle from crossing the track; and extending from the rails on either side were fences extending back and leaving a space about sixty feet, I think, between the two fences.

There was a carcass there when I was working at

(Testimony of Fred Swant.)

the ranch. I came there in February, but I didn't see the carcass until along about March sometime, when I had occasion to go across the track there. Its condition did not exactly remain the same from the time I first saw it until I lost any knowledge of it. Nothing happened more than that the dogs and coyotes had been eating off of it to a certain extent and it had decayed. [107—45]

I couldn't say positively how recently before the accident happened on the 18th day of April, I saw the carcass there. I was just going back and forth over that crossing perhaps a week or so. It gave forth odor at times. A person crossing the track, if the wind was in the right direction, of course, could smell the odor, but if the wind was not in the right direction, perhaps you would not notice it. I should judge that the carcass lay about six or eight feet from the traveled roadway, and a little bit below the traveled roadway. I rode across there a few times. When I went across I was riding a saddle horse and he would always shy around the crossing there going over there. This horse was considered a very gentle horse.

[Testimony of John Hamilton, for Plaintiffs.]

JOHN HAMILTON, being first duly sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

I am one of the defendants. That is, I am one of the persons sued in this action. In the spring of 1909 I was section foreman and had been such for

(Testimony of John Hamilton.)

seven years. I know the crossing where this accident happened on the road going to Bainville. That crossing was not under my jurisdiction at the time. At the time I was acting as extra gang foreman. In the month of April, 1909, I was acting as extra gang foreman. A fellow by the name of Carl Addoms had that section then. I commenced acting as foreman with the extra gang some time in the summer. In January and February I was prospecting for gravel.

Q. Well, you were section foreman at the time this horse was placed upon the right of way there.

A. Yes, sir.

By Mr. VEAZEY.—There is no testimony as to the placing of the horse there.

By the COURT.—Well, it was placed there some way or other. Objection overruled.

(Witness continuing.) I started to prospect for gravel the same day the horse got killed. I saw the horse there that same day. It was discovered in the morning about seven or eight o'clock. The horse was then dead. I had been over that place the day before about half past [108—46] four or four o'clock. There was nothing there then. I made an examination of the horse the next morning at half past eight o'clock. The horse was cut on the hip. The skin was broken. The horse was about sixteen or seventeen feet on the outside of the rail. The horse lay between the space between the wind fence and the cattle-guard. I don't know exactly how far up. I

(Testimony of John Hamilton.)

would say it was about ten feet from the cattle-guards.

Trains passed through there in the night-time. During the night preceding the morning when I first saw this carcass on this roadway there were two passenger trains during the night and several freight trains—I don't know how many. I did not see any freight trains there myself during the night; I didn't hear any that I remember now. I didn't pay any attention to trains going through there. Under the schedule that worked there, there were trains scheduled to go through there in the night-time. I lived on my ranch about five hundred feet from the track. I don't remember hearing any trains go through there. I might have heard them and I might not.

It was not my duty to make any report as to animals killed by trains. I was not section foreman at that time. I had charge of something else. I was prospecting for gravel at that time. Another foreman was in charge of the section at that time. As section foreman it was my duty to report about cattle killed by the trains. I did not make any report about this horse being killed myself.

Q. You directed the other foreman to make a report that there was a horse killed by the railroad.

By Mr. VEAZEY.—That is objected to as incompetent, irrelevant and immaterial.

By the COURT.—Objection overruled. To show his conception of the situation there you can draw out that he directed the witness to report that the

(Testimony of John Hamilton.)
horse was killed by the railroad. If you want the other man's report you would have to get the original report.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon noted and allowed.

The horse was about fifteen, sixteen or seventeen feet from the outside rail. It lay in a deep hole there in between the right of way fence and the wagon track. It was about twenty feet from the traveled portion of the roadway, and ten feet from the cattle-guard fence. I don't remember whether the horse was lying parallel with the track or at right angles to the track. It seems to me its head was lying to the east; I ain't sure. There were some scratches on the skin of the horse. The skin was scratched off. [109—47]

Cross-examination.

The section foreman put ties on the animal to burn it that same morning. I was on a saddle horse, and he came around on a hand-car, and he discovered the horse, at the same time he went around. The carcass was on the south side of the track, and on the road side of the fence.

[Testimony of George Anderson, for Plaintiffs.]

GEORGE ANDERSON, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination.

I am assistant roadmaster for the Great Northern, and held that position in the spring of 1909. As such

(Testimony of George Anderson.)

officer I had jurisdiction over the section foremen along my line of route. My duty is to look after the road in general, including the right of way fence and including cleaning up the right of way and keeping up the road fence. As to removing any obstructions that might be on the right of way, such as dead animals, and things of that kind, I bury them. I had jurisdiction over that too. I had no jurisdiction at all in relation to ascertaining how animals that were on the right of way got there. My jurisdiction would simply extend to disposing of the carcass after it got there.

I saw the carcass which is said to be the cause of the runaway in question. I saw it there different times between December, 1908, and the spring of 1909. My recollection would be that it came there in December. As assistant roadmaster I gave directions as to any disposition to be made of it. On account of the ground being frozen, and it being a hard matter to bury it, I instructed the foreman to burn it. I do not know how it came there. No claims come to me for animals killed by the railroad.

Cross-examination.

They burned it twice that I know of, and probably three times.

PLAINTIFFS REST. [110—48]

Thereupon, at the close of the plaintiffs' case, the defendant, Great Northern Railway Company, moved for a judgment of nonsuit as follows:

At the close of the plaintiffs' testimony, comes now Great Northern Railway Company, the defendant,

and moves for a judgment of nonsuit and dismissal on the merits, upon the testimony of the plaintiffs, on the following grounds:

1. The evidence introduced by the plaintiffs does not constitute facts sufficient to constitute a cause of action.

2. The evidence does not show that the railway company was in any manner responsible for the placing of the carcass upon the roadway in question. The testimony is undisputed to the effect that the carcass was on the roadway in question. For all that appears from the testimony, the animal may have been placed there by an agency for which the railway company is not responsible.

3. The evidence shows that the roadway in question was at most a roadway which the railway company permitted farmers to use, or others to use, or perhaps invited them to use, and under such evidence, if there were any negligence arising from the presence of that carcass which caused the runaway, the railway company would be under no duty to remove said carcass, and the roadway would be used subject to its concomitant perils, as in this case the persons are admitted to be expert horsemen and fully conscious of the effect of the carcass, and of the fact that such carcass existed there.

4. The uncontradicted evidence discloses that Bigelow was the driver of a private vehicle, and as such, was an agent of Dr. Ennis and of Mrs. Ennis, and as such, knowledge on his part would be knowledge on the part of Mrs. Ennis, and the proof shows that, even if the carcass had caused the runaway, and even

if the carcass was a perilous object, the driver testified that they knew that fact, and had seen that animal there for several months. It further appears from the uncontradicted evidence that, even under the assumption that the defendant was negligent, the defendant was not present, and the plaintiffs, or the driver, which is the same thing, by the exercise of [111—49] reasonable care, might have avoided the accident, and had the last clear chance to avoid the negligence, if any, on the part of this defendant. If the plaintiffs had the last clear chance to avoid the accident, as is shown by the proof, they could not thrust themselves, and the driver had no right to thrust Mrs. Ennis in a dangerous position, or on to a dangerous object in the road, and hence the negligence, if any, on the part of the railway company was not a cause of the accident, but a mere condition or circumstance, if such is the case, even accepting the plaintiffs' own theory of how the accident happened.

5. Lastly, the evidence does not disclose that the carcass in question, in any event, was an object which would be likely to frighten horses of ordinary gentleness to such an extent that they would run away, or that the runaway was a result which might reasonably be contemplated from the presence of the carcass there.

Which motion was by the Court overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Mr. VEAZEY.—I do not know what your Honor's views as to the law are, but if your Honor desires any

(Testimony of William Gardner.)

authority as to the principle that the negligence of the driver of a private vehicle is imputed to the occupant, I can cite to your Honor a Montana authority.

By the COURT.—Oh, everybody knows that.

Defendant's Case.

[Testimony of William Gardner, for Defendant.]

WILLIAM GARDNER, being first duly sworn as a witness on the part of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I reside at Lakeside, Montana. I was acquainted with John Bigelow prior to the accident in question. I talked with him in regard to the accident on Mr. Hennessey's place in the granary. I first met John Bigelow eight years ago this spring. I do not remember what the substance of that conversation was. I know we were talking about this **[112—50]** case, but I don't know what the substance of the conversation was. I do not remember what he said at that time in regard to how the accident happened. I remember talking with Dr. Brockman in regard to the accident.

Q. Do you remember telling him what Bigelow told you in regard to the accident?

By Col. NOLAN.—We object to that as immaterial, whether he does or not. It is hearsay evidence of the rankest kind. If he did, seemingly he told him something he did not know anything about.

By the COURT.—I presume you are approaching impeachment.

(Testimony of William Gardner.)

By Mr. VEAZEY.—Not entirely. It might be considered impeachment in one sense, but it might be considered as substantive evidence. That is, it might be considered as a declaration made by a person who would be responsible for the runaway, in which event it is a declaration made by a person whose duty is in question in this case. The duty of the driver as a third person is a question in dispute in this case, and therefore, whatever would be evidence for or against the driver is evidence between the parties to this case.

By the COURT.—I don't understand it so. You might bring in the statements of servants. That happens every day. It might be admissible for impeachment if the plaintiffs propose to let it go in for that purpose.

By Mr. VEAZEY.—I have in mind also the question that was put to Bigelow in his deposition. We advised the Court at the time the testimony of Bigelow was being read, that at the time Bigelow testified, we had no impeaching testimony, and at the time his testimony was read we withdrew the disclaimer that the question was not asked Bigelow for the purposes of impeachment.

By the COURT.—You disclaimed any intention to impeach Bigelow when you put to him a question which was not a proper impeaching question. When you ask a witness if he made a statement you must ask him the time and the place and the person in whose presence it was made. You expressly said it was not for the purpose of impeachment. It is your misfortune that you did not have the impeaching

(Testimony of William Gardner.)
testimony at [113—51] the time Bigelow testified. It is no fault of the other side. Even the best cases are sometimes lost because testimony cannot be produced. The objection will be sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We now desire to renew our objection and exception to the reading of the testimony of Bigelow, as taken at the last trial, on the ground that its admission with the rulings of the Court forecloses us from introducing impeaching testimony, and the ruling of the Court requiring us to stand by our disclaimer after we withdraw it, and compelling us to have read in the evidence the impeaching question propounded to Bigelow, with the disclaimer, and then not permitting us now to withdraw the disclaimer, and introduce the impeaching testimony, is prejudicial to the defendant. Which said exception was thereupon noted and allowed.

Thereupon the defendant made an offer of proof in writing, as follows:

We offer to prove by the witness now on the stand that he talked to Bigelow in regard to the cause of the accident, but that the conversation occurred so long ago that he does not remember the substance of that conversation; that the witness does, however, remember that thereafter he talked with Dr. Brockman and told Dr. Brockman what Bigelow had told him (the witness) in regard to the accident. We offer further to prove by the witness that he told Dr.

(Testimony of William Gardner.)

Brockman only the truth in regard to what Bigelow told him (the witness).

This testimony is offered for the purpose of impeaching Bigelow in the first place. Secondly, and separately, as an admission by the driver, as one whose duty in this case is in question, and, therefore, as a declaration or admission made by the driver would be admissible for or against him, it would be admissible for or against the plaintiffs to this case, and in connection with this offer of proof an offer will hereafter be made through Dr. Brockman, now in court, to prove that that conversation, that Gardner had with Dr. Brockman, was to the effect [114—52] that Bigelow told Gardner that the runaway was caused by the horses becoming frightened at a piece of paper, and not by the carcass. This will connect up the proof and avoid any possible hearsay objection whatever, in that the conversation or statement of Gardner is under oath to the effect that he had a conversation and reported it correctly to Brockman, and Brockman, under oath, states what Gardner said.

By Col. NOLAN.—We object to that, for the reason that it is not proper impeaching evidence. The foundation is not laid, and if it is intended as impeaching evidence, counsel, at the time of the question which would make possible, or remotely possible, the presentation of this question, distinctly disclaimed any purpose to use it for impeaching evidence, and in the next place it is hearsay evidence of the most objectionable character.

(Testimony of William Gardner.)

Which said objection was by the Court sustained, and the offer of proof denied.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. What kind of a man was Bigelow prior to the accident, with reference to his habits in regard to intoxication?

By Col. NOLAN.—We object to that as inproper, incompetent, irrelevant and immaterial.

Which said objection was by the Court sustained. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Col. NOLAN.—If your Honor will tell the jury where you exclude the evidence that they will not consider it.

By the COURT.—You may write your offer of proof if you think it will do you any good. We will give you time. It is not admissible under the issues in this case.

Thereupon the defendant, in writing, presented the following offer of proof:

We offer to prove by the witness now on the stand that the driver Bigelow was at all times prior to the accident addicted to the [115—53] habitual and excessive use of intoxicating liquors, and was, to the knowledge of the witness, usually under the influence of the excessive use of liquor, sufficient to make dull his senses, whenever, prior to the accident, he came to Bainville at any time prior thereto, for a period of

(Testimony of William Gardner.)

six months before the accident.

By Col. NOLAN.—We object to this, for the reason that, under the issues in this case, the evidence is incompetent. Also we object to it, for the reason that it has to do with conditions generally prevalent with reference to the particular matter in question.

Which said objection was by the Court sustained. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Witness continuing.) I drove across the crossing prior to the accident. Sometimes my horses would shy at anything lying on the road like any other horses. I don't remember seeing them shy there. I don't remember ever seeing them shy there, no, sir. I have handled horses all my life, more or less. I am fifty-five years of age. As regards my experience in the western country in riding and driving horses up to the carcasses of horses or other dead animals, I have passed them by, and had the horses shy by them, but I have never had any runaways. No, sir, I never heard, in my experience here, of a case where a horse ran away because he was frightened by the carcass of a horse, other than the instance in question where that claim is made.

Cross-examination.

Yes, sir, I have had a great deal of experience as a horseman. I have handled horses more or less all my life. I have not ridden particularly in this Western country, in Montana. I have lived in Iowa, Montana and Colorado. I don't recall any particular

(Testimony of William Gardner.)

carcass of a horse that I saw in Iowa the last time I was there. I do not remember in Iowa a single instance where I had occasion to run up against the carcass of a horse. A carcass of a horse would be an object at which a horse would shy. By shying I mean getting frightened and leaving the road. When a horse is frightened and leaves the road it does not always start to run. There might be several gaits it would strike getting around this animal. **[116—54]** When a horse is frightened at an object I wouldn't presume that it would always start to run. Sometimes when a horse shies you might have difficulty in getting it to move at all, yes, sir. Yes, sir, when you get a horse in that condition, not being disposed to turn back, you go by the object in spite of the animal. The object of the horse in shying under those circumstances is to get away from the object.

[Testimony of Charles Hubener, for Defendant.]

CHARLES HUBENER, being first duly sworn as a witness on behalf of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I reside at Medicine Lake, Montana. I formerly resided in Bainville, Montana. I knew John Bigelow prior to the Ennis accident. He had worked for me a couple of years as a bartender. I was running a saloon. I think Jack worked for me maybe a year and a half or a matter of that kind before the accident; I can't just remember, but it was over a year. It was before the accident. I think he left my em-

(Testimony of Charles Hubener.)

ploy just before he went to work for Mr. Ennis.

Q. What had you done in regard to the terms you offered him in connection with the saloon business?

Which question was objected to as immaterial, irrelevant and incompetent. Which objection was by the Court sustained. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Did he afterward leave your employ?

A. No, sir, I discharged him.

Thereupon counsel for the defendant made the following offer of proof in writing:

We offer to prove by the witness now on the stand that for about a year previous to Bigelow's starting to work for Dr. Ennis, Bigelow was working for the witness in the saloon business as a bartender; that witness offered during said period to give Bigelow a share in the business if he would keep sober and not get intoxicated, but that Bigelow was nearly always during said period so intoxicated that he could not attend to the business, and finally the witness discharged him, because the witness had observed that he was an habitual drunkard. [117—55]

By Col. NOLAN.—I object to that as irrelevant and immaterial. Presumably he did leave at some time, because he subsequently worked for someone else.

By the COURT.—The objection will be sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said ex-

(Testimony of Charles Hubener.)

ception was thereupon duly noted and allowed.

(Witness Continuing.) I saw Bigelow on the day of the accident in town. I saw him in town. It seems to me that I first seen him out to my farm about a mile and a half east and a trifle north of Bainville. It occurs to me that he brought Mrs. Ennis out there to visit my wife. He was out there that afternoon, if I recollect right.

Q. Tell us what happened as regards you and Bigelow. What did you do?

By Col. NOLAN.—We object to that as immaterial, irrelevant and incompetent, what they did do.

Q. Did you drive back to Bainville with Bigelow?

A. Well, I ain't sure whether I drove back with him or not, but I was in town and drove in town that afternoon with Mr. Bigelow. He was in town during the time that Mrs. Ennis was at the farm visiting my wife, and perhaps making other calls down around there.

Q. Did you see yourself where he went?

A. Well, I was naturally meeting him around my place.

By Col. NOLAN.—We object to that "naturally."

By the COURT.—Of course, the purpose of this is to show the condition of the man at the time he left town. It would not be admissible to show that. That would not be allowable as a part of the case of the defendant. Intoxication is not pleaded as a defense. The objection is sustained to this question. I don't see that that is an issue in this case.

To which ruling of the Court the defendant, by its

(Testimony of Charles Hubener.)

counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Did you see him shortly before he left on the return trip to the Ennis ranch? [118—56]

A. Yes, sir.

Q. What was his condition at that time relative to sobriety or intoxication?

By Col. NOLAN.—We object to that as incompetent, that being no issue in the case. The affirmative defense set up here in the answer has to do with a defense entirely independent of the condition of the driver on the day of the accident.

By Mr. VEAZEY.—Contributory negligence is expressly pleaded in the answer. The answer charges that the driver so negligently drove the team that the accident happened. That is clearly sufficient to authorize the introduction of evidence as to intoxication. Pleading the fact of intoxication would be pleading evidence. If you allege that an engineer so negligently drove his engine that a collision occurred, clearly intoxication of the engineer could be proved by the allegation.

By the COURT.—The objection will be sustained. There is no issue made as to the intoxication of the driver.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—If your Honor please, I have offers of proof which I imagine will take more than the time between now and twelve o'clock in order to

(Testimony of Charles Hubener.)

write them out, the time when the recess is taken, and I should like to have an opportunity to prepare them.

By the COURT.—Very well.

Whereupon a recess was had until one-thirty P. M. of the same day, when the trial was resumed.

By the COURT.—I suppose you are proceeding to an offer of proof of the condition of the driver at that time.

By Mr. VEAZEY.—In Bainville that morning.

By the COURT.—When did this accident take place?

By Mr. VEAZEY.—It took place in the afternoon.

By the COURT.—There is a plea of contributory negligence on the part of the driver. Of course, it would be imputed to the plaintiffs if he was negligent with his driving. Now, I think if you can show his [119—57] condition at the time, as distinguished from previous habits, that you will be permitted to show that—his condition at the time, not previous habits. His condition at the time, or so near that it would be reasonable to infer that it would continue to the time of the accident, and that it was a condition that would affect his driving, that, I think, would be proper to be shown.

By Col. NOLAN.—I was going to suggest that in connection with the proof, it might be a portion of the *res gestae,* but if they can show that he was drunk on this day, I was going to withdraw my objection, and let them try to do so. If they show that he was actually drunk, or if they can show that he was drunk

(Testimony of Charles Hubener.)

on the day in question, that will be all right, but I don't propose to admit evidence as to his general reputation or as to his drinking at other times.

By the COURT.—Yes, that is the attitude the Court maintains. If you have anything in relation to that at all you may proceed.

By Col. NOLAN.—Also as to the other witness.

By Mr. VEAZEY.—Whether or not the driver was intoxicated at the time.

By Col. NOLAN.—Yes, we have no objection to that. So that we won't be harrassed by the condition of the record with reference to these offers of proof that Mr. Veazey has—proof as to any drinking done by Bigelow on the day of the accident, or as to his condition then, if there is any evidence of that kind in the offer made, I will withdraw my objection to that proof.

By the COURT.—The Court knows of no offer embracing drinking or intoxication on the day of the accident. If there is any, it is the duty of Mr. Veazey to call it to the Court's attention.

Thereupon the defendant made the following offer of proof in writing:

We offer to prove by the witness now on the stand that shortly after the accident the witness was talking with Bigelow about the accident, and that Bigelow then told him that it was a piece of paper that caused the horses to run away, and not the carcass referred to in the testimony. [120—58]

By Col. NOLAN.—We object to that, for the reason that the same is incompetent, in that the at-

(Testimony of Charles Hubener.)

tention of the witness Bigelow was not called to it when he was on the witness-stand.

By Mr. VEAZEY.—In that connection let it be noted that at the time we did not have any knowledge of the evidence referred to.

Which said objection was by the Court sustained, and the offer of proof denied. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Witness continuing.) I have not had very much experience in handling horses. I own a few of them, and have driven them for pleasure off and on until the time that I was about fifteen years of age, and three or four years ago. I am now thirty-four years old.

As regards the carcass of an animal being likely to freighten a horse so that it will run away, there is a lot of difference in horses. Some horses will shy from a dead carcass more than anything else. I know it to be a fact that horses will shy at a dead animal. I have never known of an instance where they were frightened to such an extent that they ran away.

I couldn't tell you the time that Bigelow left on his return to the Ennis Ranch, but I should judge it was maybe three or four o'clock, somewhere in there. It was about the middle of the afternoon. I saw him that afternoon before he returned to the ranch.

Q. What was his condition at that time in reference to sobriety or intoxication?

(Testimony of Charles Hubener.)

By Col. NOLAN.—That is a question that was previously asked.

By Mr. VEAZEY.—I call the Court's attention to that fact.

A. I could not tell you exactly what condition he was in. He was in my place of business.

By Col. NOLAN.—We object to that.

Q. Tell us his condition and how you came to observe it, and all the facts bearing on his condition—just go ahead and tell us.

A. Well, I should judge that I know that Jack was taking a drink or two. I know that. I know he was in the— [121—59]

Q. Tell what you saw—only what you saw.

A. I saw him take a drink or two. That is all I can state. He took one or two with me.

As regards his condition, as to whether or not he was under the influence of liquor at all, he wasn't drunk. What I mean by drunk is that he wasn't staggering around. He apparently looked all right. As regards giving the jury the best picture I can as to his condition, it is quite a long time ago, but I know we were in there together. I met Jack several times that afternoon and talked to him.

Q. Don't hesitate.

A. Well, he was in my place of business and we visited, and naturally had a few drinks together. He also was down at Mr. Doyle's place. He was down in there. I don't know anything about that. During the time that Mrs. Ennis was down at my place, anyway during her absence, he was down at my place

(Testimony of Charles Hubener.)

of business and on the street. I met him several times and remember talking to him. I remember remarking to him as to the team.

Q. Well, now, in the language of the street—don't hesitate to use whatever language you desire to—such language that you would use on the street—what would be the expression of the street as regards his condition when you last saw him that day?

By Col. NOLAN.—We object to that as incompetent. He can tell us what his condition is.

By the COURT.—Yes, this man has been liquor dealing, and has seen men drunk. He can tell whether a man is under the influence of liquor or drunk, without being urged strongly. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Will you describe in your own words, and in the words that you would use on the street what you considered was his condition when you last saw him in Bainville?

A. Well, as near as I can describe it, I would put it this way. He wasn't drunk, but feeling good. That is about as close as I could come to it. [122—60]

Q. Well, didn't you describe it to me as just short of a good start for a spree?

A. Well, if he was feeling good, I suppose if he had stayed there, why, naturally, he would have wound up in a spree.

By the COURT.—You will have to explain to the

(Testimony of Charles Hubener.)

jury where the man started from—*his condition short of the start.* [Corrected by Court.]

Q. Was that the expression that you used to me, that he was just short of a good start on a spree?

By Col. NOLAN.—We object to that as immaterial, what was said to counsel. We were not there to be able to keep track of it.

By the COURT.—Sustained.

By Mr. VEAZEY.—I desire an exception.

By the COURT.—It will be noted.

By Mr. VEAZEY.—I desire to offer to prove by the witness that in response to questions by us as to what was Bigelow's condition when the witness last saw him on the street on the day of the accident, that the witness described him to us as just short of a good start for a spree.

By the COURT.—Any objection?

By Col. NOLAN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—It is very vague. I don't see that it would enlighten the jury any if he did see him *at that stage,* [Corrected by Court.]

~~drunk,~~ but he says that he did not see him drunk to the extent that he was staggering, and the witness states that he was feeling good, it looks to me about as far as this witness can go. The objection will be sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Testimony of Charles Hubener.)

Cross-examination.

Q. Do you remember down at the restaurant here this noon, in the presence of Mr. Lunke here and Mr. Wines, stating that you didn't know whether Mr. Bigelow was drunk or sober, that you don't recollect, that it was so long ago? [123—61]

A. No, I didn't say that I didn't recollect whether he was drunk or sober.

Q. I am asking you whether you didn't make that statement, that it was so long ago that you didn't remember, and that, as a matter of fact, you were mistaken in saying that he was out to your house?

A. Out to my house.

Q. I am asking you if you did not make the statement down here at the restaurant this noon, that it was so long ago that you couldn't tell whether Bigelow was drunk or sober, didn't remember anything about it, and also that you were mistaken in the statement that you had already made that he was out at your house that day.

A. I didn't make the statement about Mr. Bigelow being out to our house. I said I wasn't certain when I was on the stand whether that was so or not—

(Counsel Interrupting.) I am asking you whether you did not make that statement that I have referred to.

By Mr. VEAZEY.—I object to counsel interrupting the witness, saying that wasn't his question, when the answer was direct and responsive to the question. You can call for an answer yes or no.

Q. I will ask you again if you did not this noon

(Testimony of Charles Hubener.)

make the statement that it was so long ago that you didn't recollect anything about the condition of Mr. Bigelow on that day, as to whether he was drunk or sober.

A. I said that I wasn't positive; that it was so long ago that it was pretty hard for me to recollect the condition Bigelow was in.

Q. You made that statement this noon?

A. Yes, sir.

Q. Now, did you likewise at the same time make the statement that you were inclined to think that you were mistaken when you made the statement upon the stand that he was out to your house that day?

A. I did say that to Mr. Ennis out there afterward, and told him that after dinner,—perhaps we talked it over—that I wasn't certain. I didn't say I was positive about him being there, and I told Mr. Ennis out there after that, and we talked the matter over, and I told him I [124—62] thought maybe I was mistaken. That is the conversation that we had there, after being out there.

Q. Now, when you testified on the stand in reference to that you didn't tell us there was any doubt in your mind about it.

A. Yes, I did, if you will recollect it, and if you will look it up you will see that I said it seems to me he was out there.

No, sir, I ain't positive yet as to whether or not he was out there.

Q. Well, at any rate, all you know about his drink-

(Testimony of Charles Hubener.)

ing there that day was that you saw him take two drinks.

A. I don't know whether it was two, three or one.

Q. It was possible he only took one drink.

A. I couldn't say how many. I didn't testify that he took two. All I know is that we had drinks together. I couldn't tell you the number of drinks. Yes, sir, I am sure that he took some drinks. That was in my place. I can't recollect who paid for it. I suppose he did and perhaps I did too. I cannot tell you who paid for them. I don't remember who was present. George McCabe was the bartender. I don't know where he is now. The last I heard of him he was at Cut Bank.

At the present time I am doing nothing. I commenced doing that just recently, about ten days ago. Prior to that I was retailing liquor, serving it. I have not been running a saloon for the last year. I was working in a saloon. I am not working at the present time. About ten days ago I was working in a saloon as a bartender.

Recross-examination.

As regards whether, after the adjournment this noon, the plaintiffs sought to discuss with me my testimony, why Mr. Ennis meet me out here in the hall and told me I was mistaken about Jack driving Mrs. Ennis out to my farm. Of course, I figured at the time I wasn't certain. I didn't say I was certain in my testimony, and tried to refresh my memory on it, and I finally told him I thought he was right about it. I could get it from my wife, but I never thought of

(Testimony of Charles Hubener.)

it when I came up here. She was out there and I remember meeting her, but whether I met her the [125—63] first day at the farm, or in town, I couldn't remember. Jack was out at the farm and I think she was. Certainly, I was perfectly free in giving my information to Mr. Ennis.

Q. You didn't hold back anything?

By Col. NOLAN.—I object to that as irrelevant and immaterial, and not proper redirect examination.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We desire to prove that this witness talked voluntarily and freely at the instance of Dr. Ennis in the talk that took place during the noon intermission in regard to all the facts in the case.

By Col. NOLAN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. In view of your statement on direct examination, and the statement now made to Dr. Ennis, in regard to the sobriety or intoxication of Mr. Bigelow, would you turn to the jury and tell them what you know as regards his condition? Give them your best judgment of his condition at any time on the 18th day

(Testimony of Charles Hubener.)

of April at Bainville.

By Col. NOLAN.—We object to that as not redirect examination, as repetition of the testimony already given.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—If the Court please, here is an instance where, in justice to the witness, it is only proper—

By the COURT.—No, I don't care about hearing anything; the Court has ruled. [126—64]

Exception taken by defendant.

Q. I may be incorrect in understanding your testimony, Mr. Hubener. I understood you to say that your judgment was that, though he was not drunk, he was under the influence of liquor while at Bainville that day shortly before starting, and I understand that you stated to Dr. Ennis that you cannot state whether he was drunk. Will you enlarge on that?

By Col. NOLAN.—We object to that. I don't think it is right to have a question of that kind put in the light of the testimony of this witness.

By Mr. VEAZEY.—If I might interpose at this time—if the jury doesn't want any enlightenment on that, I want some enlightenment. Here is a statement which I am sure I misunderstood, and I think counsel has misunderstood it.

By the COURT.—I think not. All this witness'

(Testimony of Charles Hubener.)

testimony was very straight, both before, on the direct examination, and on the cross-examination. I don't think the jury is in any doubt about it. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Do you recognize, Mr. Hubener, that there is any inconsistency in your testimony on direct examination and your testimony as to your conversation with Dr. Ennis?

By Col. NOLAN.—We object to that as incompetent, irrelvant and immaterial.

By the COURT.—It will be for the jury to say. The objection is sustained.

Exception taken and noted by the defendant.

By Mr. VEAZEY.—We offer to endeavor to get from the witness an explanation as to any possible inconsistency in his testimony as regards the condition of the witness Bigelow, and his alleged declaration to Dr. Ennis.

By Col. NOLAN.—We object to the offer as improper, irrelevant and immaterial. [127—65]

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

[Testimony of Al Provost, for Defendant.]

AL PROVOST, being first duly sworn as a witness on the part of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I am farming at the present time. At the time of the accident in question I had a ranch near the Ennis ranch. I should judge it was a mile and a quarter to a mile and a half east of there. In going to my ranch from Bainville I had occasion to go over this roadway leading along the south side of the railroad track, and then crossing the track and going through a gate to the Ennis property. I guess I crossed there in the spring of 1909 before the accident. As to how often I had occasion to cross there at that time, some days I had to cross every day, night and morning, at some certain time. The number of times I would cross there would vary. When I refer to crossing at this place I refer to times when I went across with horses—driving horses. I have driven all descriptions of horses. I have driven wild horses and quiet horses.

I have never known any effect produced by this carcass on any of these horses at all. As to what experience I have had in driving horses and coming in contact with the habits of horses, I have had experience with a horse that will shy a little bit, but I have always handled them. In this western country you are apt to run across the carcass of a horse any time when driving. I have never known any instance

(Testimony of Al Provost.)

other than the case in question where it is alleged a runaway was caused by a carcass frightening the horses, and I have never had a runaway by horses being frightened by the carcass of a horse.

I could not say anything about what use I made of that crossing from April 1st to April 18th. I might have crossed there, and I might not. I couldn't say for every day at that time. I do not recall any instance where I crossed between the first of April and the 18th of April. [128—66]

Q. Was there any reason why you would cross at that time more than at any other time? A. No.

By Col. NOLAN.—We object to that as immaterial.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Would you say that you didn't cross between the first of April and the 18th of April?

A. I couldn't even say for sure. I might not have crossed and I might have crossed for all I remember.

Q. What would be the object of your going to Bainville?

By Col. NOLAN.—We object to that as immaterial.

By the COURT.—He may answer. It is an endeavor to refresh his recollection. Objection overruled.

A. Well, sir, I was going to Bainville because I had business in Bainville.

(Testimony of Al Provost.)

Q. What work would you be doing along about that time between the first of April and the 18th of April?

By Col. NOLAN.—We object to that as irrelevant and immaterial.

By the COURT.—Objection overruled.

A. Why, I was shoeing my horses and fixing up stuff for all the farmers around there. I had a blacksmith-shop there.

As to what I was doing on my ranch between the first of April and the 18th, I suppose I was doing something there, but not myself.

Q. What time would seeding take place in that part of the country?

By Col. NOLAN.—I object to that as immaterial.

By the Court.—I think so. It is going beyond the issues. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed. **[129—67]**

Q. Is there anything, Mr. Provost, that would refresh your recollection and enable you to testify as to any use of that crossing from April 1st to the 18th?

By Col. NOLAN.—We object to that as leading and repetition of what the witness has already stated.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Testimony of Al Provost.)

There is another road that leads from Bainville to Mondak, other than the road in question. I guess it was in existence at the time of the accident. I couldn't say for sure whether that road was an open road without gates in it, or a road on which you could go from Bainville to Mondak without opening gates. I couldn't say for sure, because I didn't have occasion to go by that road very much of the time. I had seen the Ennis horses before the runaway occurred on the 18th of April. To my knowledge I would call them a high strung team. No, sir, as to whether I would give any other designation of them, no, sir, I don't know anything about them.

Q. What would you say as regards the skill, if there would be any necessary, to handle them?

By Col. NOLAN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Would you say that those horses could be described as kittens? A. I shouldn't think so.

By Col. NOLAN.—We object to that. I don't think that is competent or material.

By the COURT.—I hardly think so. Objection sustained.

To which ruling of the Court, defendant, by its counsel, then [130—68] and there duly excepted; which said exception was thereupon duly noted and allowed.

(Testimony of Al Provost.)

By Mr. VEAZEY.—We offer to prove that, in his opinion, they would not be horses that could be described as kittens, as gentle horses.

By Col. NOLAN.—I object to that as incompetent and immaterial.

By the COURT.—He may describe what he knows of them. He has already said in his opinion they appeared to him a high strung team. The objection is sustained.

To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Can you give us any other description of the horses, other than that they were a high-strung team? A. No, sir.

Q. Would you call them bronchos?

By Col. NOLAN.—To that we object as leading.

By the COURT.—The objection is sustained. [Corrected by the Court.]

By Mr. VEAZEY.—Where counsel asks questions and endeavors to get the facts, and the witness for one reason or another, perhaps because of the glamour of the courtroom, or what not, is not able to respond readily—

By the COURT.—I don't care to hear an argument. The Court has ruled.

By Mr. VEAZEY.—In the interests of the defendant, I feel called upon to state to the Court—

By the COURT.—When the Court wants any argument from you and instructions on the law, he

(Testimony of Al Provost.)

will ask for it, and until that time comes you will refrain.

By Mr. VEAZEY.—I beg you Honor's pardon, but desire an exception to the remarks of the Court.

By the COURT.—It may be noted.

Which said exception was thereupon duly noted and allowed.

Q. Did you describe those horses to me, Mr. Provost—

By Mr. VEAZEY.—If the Court please, I have got to give this question in this way. [131—69]

Q. Did you describe those horses as bronchos, rather wild and hard to handle? A. I did.

By Col. NOLAN.—We object to that as hearsay and leading, and even if they are so described that is immaterial. The only evidence competent would be as to their runaway disposition.

By the COURT.—The question is a leading one. If the witness has made any ~~contradictory~~ statements here, ~~and this was~~ contradictory of any statements he had made *elsewhere,* this would be a permissible question *in order to refresh his memory, or if surprise is claimed* [corrected by Court]; otherwise not. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr.VEAZEY.—We offer to prove that the witness did to-day describe the horses as bronchos, rather wild and hard to handle. In this connection

(Testimony of Al Provost.)

we offer to prove that the leading of the witness is more or less necessary, and has not been undertaken by counsel until it was found necessary to do so.

By Col. NOLAN.—I object to that as immaterial and irrelevant.

By the COURT.—Objection sustained.

To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Cross-examination.

I am farming at the present time on my ranch about a mile and a half from the crossing in question. There were two roads going through that country there at that time, and both of them going to Bainville, and both of them going to Mondak. They were not separate and distinct from each other throughout the entire distance. They would go to Mondak, but they would come back to Lakeside. Lakeside is southeast of Bainville; it is southeast of the crossing. I think Lakeside is about five or six miles from Bainville. It is not true that as you leave Bainville, coming in the direction of this crossing, you would go to Lakeside before you get to the crossing. If I left Bainville to go to the crossing I would [132—70] go to the crossing first. If you go from Bainville to Lakeside you can go one route and get to Lakeside, or the other route and get to Lakeside, and then the roads come together, and then there is one road thereafter going to Mondak. In each instance you cross the railroad track by either road. I could not tell you whether, at the

(Testimony of Al Provost.)

time of this accident, this road from Bainville to Lakeside crossing where this accident occurred was the road that was principally traveled. I don't know whether the county commissioners started to put up an iron bridge costing several thousand dollars on that road. I worked on a bridge that was put in there, but not that year. It was put in after the accident. As regards which road I took myself in going to Bainville, I took both of them. That is, I have taken both of them. The Central Securities farm had a private bridge over the creek. I crossed there and I have crossed at Mr. Ennis' sometimes.

I didn't have the same horses all the time. I have taken a whole bunch of horses through there at different times during the time this carcass was there. I had always from ten to fifteen head, or more. At different times I was riding or driving all of them. At different times when I went through there I had either one horse or more than one. I have ridden them and I have driven them single. My horses didn't shy at all. I never knew that there was any odor escaping from that carcass.

Q. As a matter of fact, you are a standing witness, aren't you, for the Great Northern Railway Company in all of their cases? A. Standing witness.

Q. Yes, in all of those cases you are always called as a witness for the railroad company.

A. Yes, sir, I was called a few times.

Yes, sir, a carcass may so affect a horse that the horse will shy at it. No, sir, my horses did not. Yes, sir, I have seen a horse shy at a carcass. I can-

(Testimony of Al Provost.)

not tell you when, but I have seen them. I don't know the circumstances. I have seen when you drive by them and they sometimes shy at it. As to what I mean by shying I mean scary. Well, it will just scare them and they will get out of the way. I don't [133—71] let them increase their speed; I hold them down. I always had that experience. I always hold my horses. They have shied, but I have held them just the same. They never shied, going by that carcass on the roadway. I never saw one there. I have had horses shy before this accident, and since this accident. Some of this same bunch that I took over there during the time this carcass was there were horses that I have had shy.

Redirect Examination.

Yes, sir, I have been a witness for the Great Northern Railway Company once or twice. I did not testify in this case before. I was called as a witness at the last trial, but I was never on the stand. I have also testified for the Great Northern Railway Company in Glasgow in a fire case and in Williston, North Dakota. The cases in Glasgow and in Williston were not different fires, but two cases for the same fire. I have testified for the Great Northern in no other case.

[Testimony of Dr. D. R. Brockman, for Defendant.]

Dr. D. R. BROCKMAN, being first duly sworn as a witness on behalf of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I reside at Polson, Montana. I used to reside at

(Testimony of Dr. D. R. Brockman.)

Lakeside, at the time of the accident to Mrs. Ennis, on a homestead there. I know William Gardner. I talked with him in regard to the Ennis accident.

By Col. NOLAN.—You want to ask this witness if Gardner didn't tell him something.

By Mr. VEAZEY.—Yes.

Thereupon defendant offered in writing to prove by the witness now on the stand (Dr. Brockman) that shortly after the accident he had a conversation with the witness Gardner, in which Gardner discussed the accident and the cause thereof, and told the witness that Bigelow had told him (Gardner) that it was a piece of paper that scared the horses and caused them to run away, and not the carcass.

By Col. NOLAN.—I object to that as incompetent and hearsay.

By the COURT.—Objection sustained. Do you contend that there is any possible legal basis upon which that evidence would be proper? [134—72]

By Mr. VEAZEY.—Yes, but your Honor has ruled that you do not desire argument. I will submit it to your Honor at another time.

Which said objection was by the Court sustained. To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

[Testimony of J. A. Torqueson, for Defendant.]

J. A. TORQUESON, being first duly sworn as a witness on behalf of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

In April, 1909, I was out there. I was in Montana, at the Central Security Ranch in Montana. Yes, sir, that is the ranch near the crossing where Mrs. Ennis was hurt. When you ask me whether I remember the occasion of the accident to Mrs. Ennis I cannot understand what you mean. I do not remember the runaway taking place at that crossing. Yes, sir, I remember where Mrs. Ennis was hurt. She was hurt on the other side of the railroad track. I remember a crossing near the Central Security Ranch. Just before she was hurt I stood right up by the barn. As regards whether I saw the Ennis horses at any time before they started to run away, yes, sir, I see them when they came down the hill. As to whether I saw them at any time before they sarted to come down the hill, yes, sir, I see them coming from the point down that hill.

Q. What hill was that?

A. There was another crossing there further up,—further to the west, nearer to Bainville, and I saw the horses coming down the hill there the last crossing they crossed. That hill is below Miss Hanson's house. I saw them coming down the hill there. As they came down the hill I saw a piece of paper fly, blow—as they came down the horses got away and came right back again. As regards what happened

(Testimony of J. A. Torqueson.)

when the paper flew across the road, when the paper flew out the horses went past; they jumped and went across the track.

Q. Now, where did that happen with reference to coming down the hill?

A. How far? [135—73]

Q. How far from the Hanson house, for instance?

A. Oh, they must be—when the paper blow up, you mean?

Q. Yes. A. I cannot tell how far they are.

Q. Is there any object there that will help you identify where the horses were when that paper scared them?

A. Yes, they wasn't very far from the track.

Q. Was there any object on the Hanson property that would identify that place?

A. I don't know what you mean.

Q. For instance, you leave the hill from the Hanson house and start coming down the hill. What do you come to on the Hanson property before you reach the track?

A. Why, you went through a gate there.

Q. Now, where did that paper fly up and scare the horses with reference to the gate—on the Hanson house side or on the crossing side?

A. On the other side of the gate.

Q. What do you mean by the other side of the gate? A. On Miss Hanson's house side.

Q. That is, on the Hanson house side? A. Yes.

I had occasion to go over that crossing that spring. I worked there. I worked on a piece of

(Testimony of J. A. Torqueson.)

land down this side of Dr. Ennis' place. It was Mr. Lundquist I worked for there. My work in connection with working that land brought me over the crossing. From April first to April 15th I had occasion to go over that crossing for about a week before and after the accident. That is to say, about a week all together before and after the accident. I had four horses that I drove across there. I drove them across in pairs. I drove them across as a four-horse team. They did not pay any attention to that carcass. When I went by there I did not notice any smell from the carcass. During the week that I spoke of I went up and down that crossing every day, and before that I used that crossing just when we worked there. We would pass there. The work which we were doing down on the Lundquist field at [136—74] that time was seeding and plowing and dragging. Yes, sir, I saw what was left of the carcass. I saw the bones left just before the accident. As regards describing the carcass, telling what it looked like, ribs, head and bones was there. I didn't see any meat on it.

I saw these horses coming down the hill, yes, sir. I then took my single horses and I took Lundquist's saddle horse and went over. I saw Miss Hanson and others there and then I came over. Mr. Lundquist came there. There were a few others; I don't know who they were. I noticed Bigelow, the driver.

Q. Did you notice anything in regard to his condition, in regard to whether he was under the influence of liquor or not? A. Just smell, that's all.

(Testimony of J. A. Torqueson.)

Q. What do you mean—you smelled the liquor?

A. His breath.

I first started to work at the Central Security Ranch in the middle of March, 1909. I don't know what time it was that I first started to work in the Lundquist field which made it necessary for me to go across this crossing. It was in the spring. I cannot tell the date exactly; I don't know the date. I do remember that it was some time before the accident. I didn't see any other horses go over that crossing prior to the accident, no, sir. When I would go over there I would go over there alone. Yes, sir, at other times I guess the other hired men crossed there when I crossed there. Other teams were crossing there at those times, yes, sir, Lundquist's teams. They would not cross with me, but after me. Sometimes I was ahead of them and sometimes they were ahead of me. Sometimes I would see them cross and sometimes I would not. I didn't notice any effect of this carcass on those horses.

Cross-examination.

Q. When did you first speak to anybody about the horses being frightened by this paper?

A. I didn't speak to anybody. I just seen these horses, they come—

Q. There was somebody from the railroad that came to see you, some claim agent? [137—75]

A. That time?

Q. Yes, or soon after. A. There was nobody.

Q. Well, any time did they come to see you?

A. There was nobody spoke to me about that.

(Testimony of J. A. Torqueson.)

Q. Nobody spoke to you at all? A. No.

Q. And you never spoke to anybody about it, did you?

A. No, not anybody. There was the people who seen it after it happened.

Q. Well, did anybody from the railroad come—any claim agent, come to see you about your testimony, about the evidence that you would give, what you knew? A. No.

Q. When was it that you first told anybody that you saw the team frightened by the paper?

A. Frightened where?

Q. When did you first tell anybody about that?

A. I don't remember.

I was over at the barn, yes, sir, across the railroad track from Miss Hanson's, and the team was coming down the hill. It got frightened at a piece of paper. I didn't see them get frightened from the paper, but I seen the paper fly up in front of them. As regards how large a piece of paper it was, it was large enough to see it. I couldn't tell you whether it was about a foot square, as indicated by you, but I see the paper. I saw it coming from the ground, yes, sir. I couldn't tell you how high it came. I didn't see it strike the horses. No, sir, it is not true that I didn't see the horses at all, or that somebody has been telling me about that. I don't know where the paper went to after it got up. I couldn't state whether the paper blew from the brush or from the ground, it came up. I don't know whether it is true that it would not come from the ground

(Testimony of J. A. Torqueson.)

if it came from some shrubbery or brush on the side of the road. I don't know where it came from but I see the paper. That was before the horses reached the gate. As [138—76] to whether the horses were then lost from my sight, and as to whether there was a time that I didn't see them, why I saw them all the way when they crossed the track, the top of the buggy. Yes, sir, there is a depression in the ground, but it wasn't so deep but what I could see the horses. Yes, sir, I could see the horses all the way.

Q. And for what distance?

A. For what distance?

Q. From the time when they got scared until they reached the track. A. How far, do you mean?

Q. What was the distance that they traveled?

A. That they were traveling?

Q. Yes. A. I couldn't tell.

Q. Did you see what Bigelow was doing when the paper scared the horses?

A. No, I did not. No, sir, I didn't see what he was doing at all. No, sir, I did not see what he was doing during the time that they were going on until they came to the track. I see them here running and when they came across the track.

Q. Well, how much of the horses did you see?

A. How much of the horses?

Q. Yes, how much? All of them, from their feet up to their heads.

A. That I could see them.

Q. You could see all of them from their feet up?

(Testimony of J. A. Torqueson.)

A. Yes, I could. I stood up high.

No, sir, I did not get up on the building. I stood by the barn. I saw the team coming down the hill across here and there is a ravine there. On the plat you show me the Hanson house and the crossing. They would be coming down this road to this crossing, yes, sir. As to whether I saw the paper as they were coming down the slope of the hill, yes, sir, on the foot of the hill, on the bottom of the hill.

Q. Then the team got to the bottom of the hill, down in the [139—77] bottom when you saw the paper?

A. Yes, the team was in so deep that I couldn't see it there.

Q. How did they come down the hill—were they trotting?

A. Yes, they were trotting down the hill.

They wasn't walking. I did not notice whether Bigelow was whipping the team or not, no, sir. Yes, sir, I could see all the time they were coming down the hill. I didn't see their feet, no, sir, but I saw the horses and the buggy. I don't know how far it is from the Hanson house to the bottom of the hill; I never measured it. I was by the barn. You can't say how far the barn would be away from the bottom of the hill when you do not measure it. I cannot say for sure. I cannot tell. I didn't measure it. It must be an eighth of a mile from me, from the place where I stood. I was standing by the manure pile behind the barn. There was a high manure pile there. I saw the team coming and I was look-

(Testimony of J. A. Torqueson.)

ing at it. No, sir, I did not expect a runaway. I was watching the team because there was a friend of mine, he was coming up from town to get a team. He said he was coming down that Sunday, and I thought it was him coming. I don't know what the distance is from the bottom of the hill to the railroad track. It ain't very far. As to whether it would be a hundred feet, I cannot tell for sure. I couldn't tell whether it was a hundred feet or more. No, sir, as I saw the team coming down the slope I couldn't tell if it was my friend or not before I came over there. I thought it was when they came.

No, sir, I did not know Mrs. Ennis for a number of years. I had never seen her before. I had met Bigelow a couple of times. I couldn't tell who those people were before they came over there. I couldn't say for sure who was in the buggy until after the accident.

Q. Did anybody ever come to see you about what your testimony would be, come to see you up there?

A. Where?

Q. Come to see you about standing up there where you were working, up to Lundquist's place?

A. No.

Q. And you never told anybody before. You couldn't say what [140—78] your testimony would be, what you were going to tell, or what you knew?

A. Well, I was going to tell what I seen.

Q. I am trying to find out whether you told somebody else about this before you came here.

A. Yes.

(Testimony of J. A. Torqueson.)

Q. Well, who was it that you told, did you tell Lundquist? A. No.

Q. You were working for Lundquist? A. Yes.

No, sir, I ain't working for him yet. I am farming for myself. I am now working ten miles north of Bainville.

Q. Do you know those special agents down there, the railroad claim agents? A. I don't know.

Q. Well, now, you saw this team constantly from the time it started to come down the hill until it got past the track?

A. Yes, I saw them come down from the hill until they crossed the track.

No, sir, I didn't lose sight of them; they just came across the track.

Q. Well, as you came down from Hanson's, you came down a slope didn't you, and you strike the bottom, don't you? A. Yes.

Q. Then there is an elevation again, and then there is another slope, isn't there?

A. Yes, on the other side of the track.

Q. That is on the other side of the track.

A. Oh, there isn't on the Hanson side of the track.

Q. A slope? A. A slope, yes.

Q. Well, after you get down to the bottom then you travel on the level ground until you get to the track.

A. From Hanson's place, do you mean?

Q. Yes. [141—79]

A. When you come down from the Hanson place there is a little ravine, and you go through that and then you come up the track.

(Testimony of J. A. Torqueson.)

Yes, sir, I saw them when they were in the ravine. Yes, sir, in the ravine you could see them. Yes, sir, I saw them when they came up to the track and got on the railroad track. No, sir, I can't tell you about the size of this piece of paper. I know it was a paper that scared the horses because it was white, but it might have been a piece of cloth. I don't know whether it was or not. I could not tell whether it was a piece of cloth or a piece of paper. I should say it was white. As to how I happened to tell that it was a piece of paper, when I didn't know whether it was a piece of paper, I thought it was a piece of paper. I don't know whether it was a piece of paper or not, but I say it was white. No, sir, no one told me, in speaking about it, that it was a piece of paper that I saw flying up.

I didn't notice any smell from that carcass. When I crossed there I didn't notice in what direction the wind was blowing—whether it was blowing towards the road or away from it. I didn't see any flesh upon this carcass at all. I don't say that there wasn't any flesh. I see the bones. I didn't see any portion of the skin on the bones. I didn't take no notice of that. I just put my eyes on it when I passed there a couple of times. The carcass was laying along there on the side. I didn't notice whether there was any flesh right close to the ground on the carcass. I wouldn't say there was not. I didn't notice any. I saw the bones there.

There are two roads there. One goes along the track and one goes up by Miss Hanson's house. The

(Testimony of J. A. Torqueson.)

road that comes down the slope into the ravine I could see from where I was. Yes, sir, in that ravine I could see a team from where I was.

Q. Isn't it likewise true that the brush conditions were such there intervening so that you couldn't see?

A. That is a very hard question.

Q. What do you say as to that, as to whether or not the brush conditions were not such as to shut off your view from where you were? [142—80]

A. Well, when that team came I could see the whole thing from that road.

There was not a good deal of brush there that I could see. I saw over the brush, yes, sir. Yes, sir, my horses never shied. I cannot tell you how close to the carcass they got. I drove the animals across there in the month of April, yes, sir. No, sir, I did not drive them in March. I passed a week in seeding. I drove across there every day for a week. Yes, sir, night and morning. I was going down to the place where I worked. I was coming from the place where we stopped all night. We went from the farm down to this place where we worked and then came back to this farm in the evening. That was in the month of April. That was not in the month of March. I never went there in the month of March. I commenced doing that sometime in April. No, sir, I did not go by there for two weeks or so before the day of the accident, night and morning, but for a week. Sometimes the weather was warm and sometimes it was cold. This week sometimes it was warm and sometimes it was cold. No, sir, I

(Testimony of J. A. Torqueson.)

didn't smell anything at all.

In taking the horses along there I drove them afoot. The horses were not hitched to any conveyance at all. I drove them. I had the lines. I had a team and was behind them, yes, sir, and the horses were ahead of me. No, sir, I didn't notice whether the horses saw the carcass, or not.

I cannot tell you how high this manure pile was above the ground. It was high enough to see the horses.

Q. Well, if you were standing on the ground, could you see standing on the ground, as well as up by the manure pile?

A. Yes, I was standing there and saw it.

Q. I thought you told me that you went up there for the purpose of finding out whether this team coming along there was the team with somebody that you expected.

A. Yes, I said I was standing up there and I seen the team coming.

The manure pile was way back of the barn, yes, sir. I was standing there. No, sir, I wasn't working at the time. This was Sunday. I **[143—81]** didn't work. I was not working that day. As to what took me there, I was in the barn and taking care of the horses, and then I saw the team coming and I went up there.

[Testimony of John Lundquist, for Defendant.]

JOHN LUNDQUIST, being first duly sworn as a witness on the part of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I reside at Bainville. I am a farmer and merchant, a country merchant. I am in the banking business, general merchandise, lumber, ranching and farming. I ran a general merchandise store at Bainville. I was at Bainville at the time of the accident to Mrs. Ennis. At the time of that accident I was up at the farm—it is called the Security Ranch. I did not see the runaway. I saw the scene of the accident, I presume about three minutes afterward, but the horses had already disappeared before I saw it. Mr. Flynn and myself were in a buggy. I was sitting in front of the barn at the Security Ranch with Mr. Flynn. We drove over there as fast as we could, and when we got there we found Mrs. Ennis sitting on the ground. We noticed Bigelow. I saw Bigelow. He was quite excited, and—well, I wouldn't say I considered him sober nor drunk. I couldn't say in regard to that, but the man had been drinking some. As to how he talked, well, he was excited. Oh, I don't know that there is any other sympton that I can give you as bearing upon his condition. Bigelow talked while there, yes, sir. He talked to different people.

Q. Now, as regards his manner of speech, was there anything in that, that would indicate his condition with reference to sobriety or intoxication?

(Testimony of John Lundquist.)

By Col. NOLAN.—I shall object to that. Of course, we shall insist here that what he did was competent, and if we are going to have what he said we want it all.

Q. Was there anything about his breath?

A. I didn't get close enough to smell of his breath.

In going to the scene of the accident we took the road along the railroad track, that being the shortest. That road leads right along [144—82] the railroad track and right there at the crossing. It is west of the track. The railroad runs north and south and the public highway goes east and west. As regards reaching that road from my ranch, well the gates are open, and there is a private crossing there to my right, a quarter of a mile northwest of where this other crossing is. Yes, sir, we went along that road and then the Bainville road leading to the crossing, and then went over the crossing. At the time we went over the crossing to get to the scene of the accident we were driving Mr. Flynn's horse; it was a single horse. It was a good spry, driving horse, a good stepper. The carcass did not have any effect upon that horse at that time. As we went over that crossing at that time we did not notice any odor from the carcass.

About the time of the accident and for some time prior thereto my men were putting in a crop on some land that I have got south and east of there, south and east of the Ennis place. I think it started somewhere about the 10th, 12th or 15th—somewhere along in there, of April. They wasn't working on this

(Testimony of John Lundquist.)
occasion any more than the men that ran the engine. They had been down there and cleaning up and they came back from that before the time of the accident. I couldn't say how long that work continued. There was only a couple or three hundred acres that we put in there. I had probably eight or ten men working there in the spring. Yes, sir, the crossing was used in connection with this work. When they worked on that part of the farm, they would use that crossing morning and night. They all worked the horses except the man that worked on the steam plow. I never saw any of those horses cross the crossing at that time, except the team that I drove myself going down there to inspect the work. Oh, I would inspect the work there every day or every other day. In going down there to inspect that work sometimes I drove a mare that I had, and sometimes I drove a team. I had a private mare that I drove. Sometimes I would get a team from the livery barn that I had up town. These were just ordinary horses. They would shy, but they were not the most gentle horses. In the course of using that crossing I did not notice any effect of that carcass upon my horses. I never noticed any effect at all. I never noticed any of them, and never **[145—83]** heard any men talking about it. No, I don't recollect that I ever got any odor or smell from the carcass as I went over there. It was so early in the spring, so there wasn't very much.

Miss Meinhardt, Miss Peterson, Flynn and myself and then some of the men on the farm were there

(Testimony of John Lundquist.)

immediately after the accident. I don't just remember who they all were. Those people were all acquainted with Dr. Ennis, yes, sir. All I know about that is that I have seen the ladies associate with Mrs. Ennis and Dr. Ennis at different times up town together. That is all I know about it. The women got there probably a minute later than we did.

Q. What did they do while they were there?

By Col. NOLAN.—We object to that as immaterial.

By the COURT.—He may answer.

A. They were talking to Mrs. Ennis.

Q. How was Bigelow dressed on that occasion? Did he have a coat on?

A. He did not. Not when we came over there.

Q. What was the condition of his vest?

By Col. NOLAN.—Objected to as immaterial.

By the COURT.—Objection overruled.

A. His vest was unbuttoned.

Q. As he would go around there, did you see anything upon him by reason of his vest being open or unbuttoned?

By Col. NOLAN.—Object to that as immaterial.

By the COURT.—Objection overruled.

A. There was a bottle sticking up through his inside vest pocket.

As regards the condition of that carcass at the time of the accident I never looked at it at the time. No, sir, I never looked at the carcass at the time of the accident. As regards the condition of the carcass about the time of the accident from my having seen

(Testimony of John Lundquist.)

it at other times, I can not state within a few days what its condition was, but I saw it there and it had been burned. That is, I saw pieces of ties that they had used for burning it and they hadn't all burned up. **[146—84]** There was dirt thrown up against the sides of it. All the coyotes and dogs, and I had an old hound there, and they were all feeding off of that horse all winter. As to whether there was any meat on the bones that I could see, I was never interested enough in those kinds of things to notice. No, sir, I don't recall that I ever saw any meat, because I don't want to look at those things any more than I have to.

Cross-examination.

As to whether it was a very ungainly object to look at as it was there, and in the condition in which it was, well, I have seen worse by far, but then at that very day that we saw it we were interested in something else, and we didn't allow it to agitate us. Yes, we did not look at it at all that day, but I had seen it there that spring. It was just the form of a horse, and the meat off of it on the top of it and the edges. There was not very much sunshine at that time of the year on the 18th of April. I don't recollect whether there was any at all. There was not very much degree of rottenness at that time of the year, not very much about the 18th of April. I don't recollect whether there was any at all that day, but I know there couldn't have been very much, because the frost wasn't out of the ground until the middle of April or so, when we started our spring work. I couldn't tell

(Testimony of John Lundquist.)

you what the temperature was on the 10th of April, but I know we worked in the field about that time and so on. It was not down to freezing there until the night-time. Certainly in the daytime it got pretty warm.

Q. Well, now, do you pretend to tell us, Mr. Lundquist, that it was not any decomposed—any decomposition in that flesh there at all?

A. Not as bad as later on in the summer when the weather was warm.

Q. I don't care how it would be, but I am asking you was there any at all?

A. I never noticed any.

Q. You wouldn't say that there was, or was not?

A. No, I wouldn't. I knew there was nothing said about any smell that day.

Q. I didn't ask you about that, Mr. Lundquist. Will you kindly answer my question? [147—85]

By the COURT.—Yes, don't volunteer any information.

I shipped a little on the Great Northern. I don't see how I could ship over any other road. I am in the merchandise business; also in the farming business, and I handle a good deal of farm products, and I use the railroad for that purpose in the shipment of it, certainly. I am not on the very best terms at times with the railroad. I had to sue them once. This was about five or six years ago. I haven't had any lawsuit with them for five or six years, but I have claims against them, but they are not settled. No, sir, they do not settle them. There are claims

four or five years old outstanding. No, sir, I don't expect to settle them, because they cost more to collect than they are worth. Yes, sir, I am going to give them up. It is immaterial to me whether they are friendly or unfriendly. I have got to pay my freight just the same. I don't expect to collect those claims. They have refused payment. My place of business is at Bainville, at Poplar and at McCabe, and I am also in the lumber business. Certainly cars of lumber that I handle come over that railroad. I don't deliver any lumber. The farmers come in and buy it from the lumber yard and haul it away.

I was over that crossing at least three times a week prior to that Sunday when the accident occurred. Yes, sir, if the accident occurred on Sunday I was there at least three times the preceding week, and probably six for all I remember.

Q. But you haven't any recollection about it at all, except that being your practice, you did do that in this instance?

A. I went down there and started them to work in that field, in that farm down there, both with the steam rig and with the teams.

Q. You are not answering my questions. I said, as to going over there three times, or six times, or as to going over there six times, you have no recollection about it, except as it might be in the observance of a practice of yours? Is that correct?

A. Why, I only know that I went down there when the men were working there practically every day.

(Testimony of John Lundquist.)

Q. Have you any recollection about that?

A. Yes, sir. **[148—86]**

Q. Very well, then, if you have tell us how many times you went over there the week preceding that Sunday?

A. I have told you about three times at least.

Q. And maybe six times.

A. Yes, sir, I wouldn't say.

It was early in the winter that I first saw this carcass there, probably in January. In comparing its condition then, as compared with its condition as I saw it three or four days before the Sunday on which the accident occurred, at times it was whole, and afterwards they had it pretty well chewed off. Yes, sir, some of my dogs assisted the coyotes. They took turns about. I was not watching or observing them myself, but I have a boy that did. Yes, sir, when we came to the scene of the accident there were some people there before us. I came by the road. I crossed the railroad in front of my place, and then crossed it at the crossing where the runaway was. I drove along the track on the west side of the railroad. I did not come by that branch road that came around by the Hanson house. I took a short cut. Miss Hanson was there when I got there. Miss Meinhardt and Miss Peterson were there and Mrs. Ennis. Mrs. Ennis was sitting on the ground. No, she was not paralyzed. She said she was hurt, but she thought she would be all right. Yes, sir, it was apparent to me that she was badly hurt. Yes, sir, Bigelow seemed to be excited. I do

(Testimony of John Lundquist.)

not know anything about whether he had been up to the Hanson house then or not. Only I saw them there from the time they left town. He was not panting particularly, he wasn't doing any running. A man doesn't have to pant if he ain't moving very fast. His vest was open, yes, sir. I don't know whether he had been working that afternoon or not. I don't know anything as to why his vest was open or whether it was consequent upon his running up to the Hanson's. I couldn't say whether he was drunk or sober. He had been drinking a little. I certainly saw him walking around there. Yes, sir, he talked. I wouldn't say that he was drunk. He could talk and he could walk. As to whether I have known Bigelow intimately, I had seen him around there for a couple of years or more.

My horse had never shied at the carcass, no, sir. No, sir, no **[149—87]** teams that I drove there ever shied at this carcass.

Redirect Examination.

I had a suit about five years ago against the Great Northern for stock killed on this crossing. That case was tried by the railroad company. I won it. I was served with a subpoena by you to attend in court to-day.

Q. Were you present at the time of the last trial?

A. I was.

By Col. NOLAN.—We object to that as immaterial, whether he was or not.

By the COURT.—I think so.

Q. Were you in attendance at the last trial as a

(Testimony of George Anderson.)

witness for the plaintiffs?

By Col. NOLAN.—We object to that as wholly immaterial.

By the COURT.—Sustained.

To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We offer to prove that at the last trial the witness was present and was called as a witness for the plaintiffs.

By Col. NOLAN.—We object as immaterial. [Corrected by Court.]

By the COURT.—Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

[Testimony of George Anderson, for Defendant.]

GEORGE ANDERSON, being first duly sworn as a witness on the part of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I have already testified. I was assistant road-master for the Great Northern Railway Company, having jurisdiction over the scene of this accident. The carcass was laying there in plain view. The occasion which I had to be there at the crossing was going over the line on hand-cars or on trains. I would have occasion to go over on the hand-car two or three times a week. I make those trips the year round, two **[150—88]** or three times a week for the year.

(Testimony of George Anderson.)

The condition of the carcass as I observed it after the burning was that it was principally bone. At the time of the accident or about that time it looked to me like a heap of bones. I did not see any flesh on it. I didn't see any skin on it. It was not unpleasant as I passed by there. I did not notice any odor from it.

Q. Did you ever hear any complaint made in regard to this carcass appearing there?

By Col. NOLAN.—We object to that as irrelevant and immaterial, whether he heard complaints or not.

By the COURT.—Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We offer to prove that no complaint was ever made, and the witness knows of no complaint ever having been made as to the carcass being there.

By Col. NOLAN.—That is objected to as irrelevant and immaterial.

By the COURT.—Objection sustained.

To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Prior to the runaway in this case which is alleged to have been caused by the carcass there I had never heard of a case where horses had run away by taking fright at a carcass.

Cross-examination.

I was then living at Culbertson, about eighteen

(Testimony of George Anderson.)

miles from this carcass. I was in the habit of going over this track about three times a week, sometimes on the train and sometimes on a vehicle that I handled myself. In going by on a train, as to whether I would have much of a chance to observe this carcass, or any odor that might be emanating from it, it would be in plain sight on account of being inside of a curve so that it could be plainly seen on the train. You could get the odors **[151—89]** from the train if there were any there. If there was any there and the wind was right you could get it on the train. I rode on both passenger and freight trains. Those trains were running day and night. Sometimes I rode in the night-time and sometimes in the daytime. My recollection is that I first saw it in December. It would be a matter of a month anyway. I don't know the exact time I first saw it. I didn't make a note of it. I first directed that it should be burned the first time that I discovered it. The reason why I gave that direction was to do away with it for sanitary purposes. Burning it will do away with it for sanitary purposes, won't it? I was present when the carcass was there.

Q. And you were apprehensive, weren't you, that it would decompose, and that there would be an odor from it? Wasn't that the object that you had in view in burning it? A. Yes, sir.

Q. Well, now, in January there wasn't any danger of any odor; it was cold up there in January?

A. Yes, sir.

Yes, sir, somewhere near there was the time that

(Testimony of George Anderson.)

I first ordered that this burning should be done.

Q. And it wasn't for sanitary purposes then that you gave directions that it should be burned?

A. We get a Chinook occasionally.

Yes, sir, I was expecting a Chinook. Yes, sir, I directed that it should be burned again, and I directed that it should be burned a third time. I figured on destroying it. I wanted to destroy it by burning it, yes, sir. As to whether it was destroyed on the 18th of April, well, there couldn't have been much left of it. There is no odor from bones. The skeleton was there. I gave orders to destroy it, so it wouldn't smell.

Q. Now, seemingly, the first time that you gave directions the work wasn't done, so that there was a possibility of it smelling. A. Yes, sir.

That was the early part of winter, in the early part of January. **[152—90]** It couldn't have been there over ten days the first time I ordered it burned. Yes, sir, I gave directions to somebody who was working for the company to do that. It was pretty cold then. I gave directions for the second burning on my next trip about two days after the first burning. Yes, sir, my orders were carried out a second time.

Q. So that there wasn't any direction given by you in reference to it after that?

A. I think I sent—I was out there on foot one day, and I told them to burn it again.

I couldn't say how long the directions as to the third burning were given after the second time.

(Testimony of George Anderson.)

Q. Do you know whether your orders were carried out the third time, or not?

A. Well, that I wouldn't say. It is quite a while ago.

Yes, sir, I got off at the crossing there myself at times to inspect the track, to inspect the crossing. At that time I was in close proximity to this carcass. I have no recollection as to how recently before the 18th of April it was that I got off at the crossing there. No, sir, I never got any odor from it myself at all. I never got any odor either before or after the first burning or second burning or third burning, if there was a third.

[Testimony of John Hamilton, for Defendant.]

JOHN HAMILTON, being first duly sworn as a witness on behalf of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I have already been sworn. Shortly after the carcass appeared on the crossing I was prospecting for gravel. I prospected for gravel a couple of months. In prospecting for gravel, in the course of a day I would prospect south, north and southeast, all around there in the vicinity of old Bainville. Old Bainville is just about a quarter of a mile from this crossing. In that work of prospecting for gravel, in going to and from my work I went by this crossing lots of times. I would be out on a trip prospecting for gravel ten hours a day. Ten hours work was my day. I would be out prospecting for gravel possibly

(Testimony of John Hamilton.)
eight or ten hours a day. I would be out just about eight hours is [153—91] what I mean. Then I would come home every day. As regards what opportunity I had to observe this crossing from the time the carcass was there until the time of the accident, well, I was prospecting for gravel in all directions around Bainville there. I passed that railroad crossing there, we will say about three or four times a week. I don't remember exactly about that, about how many times in the week, and the carcass of a horse was burned there. The carcass was burned three times. The first time it was not a very good job on that carcass, and then the section foreman that was in charge of the section at the time started up another fire and burned it. But still there was something left after that, and the Central Security had a lot of hound dogs, you call them, and I see the dogs there eating the meat off. After I finished my search for gravel I had charge of the same section. As regards my opportunity, in the course of my work in charge of that section, after I had finished searching for gravel, to observe that crossing, well, my duty was to go over the section every morning, and go over the section regularly. I would return every day, but sometimes it was late in the evening, about five o'clock. My section extended from Lakeside on the east to the west end of the Bainville yard.

Q. So your section extended from the west end of the Bainville yard easterly?

By the COURT.—You needn't go into details. If the plaintiff wants to examine him, he can. All his

(Testimony of John Hamilton.)

duties would cover too much ground for this particular purpose.

Q. How would you go over your section?

A. About twice a day.

We start out from Bainville at seven A. M. on a hand-car, operated by hand. As regards whether in approaching this crossing, there would be anything that would control our movements over there, and over that crossing, as regards going fast or slow, we had to stop there and send a man ahead there on account of a sharp curve and a cut to the east. I had to send a man ahead to look for trains.

Q. In your work as section foreman what is your duty?

By Col. NOLAN.—I don't care about this. I don't see any point to this. [154—92]

By Mr. VEAZEY.—I want to show his opportunity for observing the conditions there.

By the COURT.—Never mind, bring it right *to the crossing,* [Corrected by Court]

down, ∧ and if the transaction isn't specified with sufficient particularity, that can be brought out on cross-examination. Prove what he knows about the conditions at this crossing.

Yes, sir, I know the facts in regard to the carcass and its condition. I never noticed any odor or smell from that carcass.

Q. Was there any fact right before the accident, or do you recall any fact which would show your ability to observe whether or not there was any odor from that carcass?

(Testimony of John Hamilton.)

By Col. NOLAN.—We object to that as being incompetent, immaterial and irrelevant and leading and suggestive.

By the COURT.—You have asked him in infinite *now and* [Corrected by Court]
detail ∧ what he saw there. ~~and~~ *He* has said there was no odor. Now, I think, that serves your purpose. Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Did you ever stop there shortly before the accident? A. Yes, sir.

Q. What did you stop there for?

By Col. NOLAN.—We object to that as immaterial.

By the COURT.—Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We offer to prove by the witness now upon the stand that he often went back and forth there before and after the accident, and that he and his men took dinner on the right of way there on the crossing and observed no odor from the carcass.

By the COURT.—You can ask why he stopped there. Ask him how long he stopped there.

By Mr. VEAZEY.—Is the offer of proof denied? [155—93]

By the COURT.—Oh, yes.

(Testimony of John Hamilton.)

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Col. NOLAN.—Of course I have no objection to his showing that he was there a week before, and that he crossed there.

By the COURT.—The Court has indicated that he may do so. There is a limit to these matters of detail.

Q. How long did you stop there on the occasion about a week before the accident, right near the carcass?

A. I stopped there during dinner time, I and my crew, eating dinner there.

By the COURT.—You are asked how long you stopped there at that time.

A. An hour.

I stopped right in the crossing there at the edge of the track.

Q. What direction did you give as regards the burning, as regards the fuel which should be used?

By Col. NOLAN.—We object to that as immaterial, what directions he gave as to the fuel or what was done in that connection.

By the COURT.—Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

No, sir, I did not set the fire myself.

Q. When you would look for gravel what conveyance did you use then?

(Testimony of John Hamilton.)

By Col. NOLAN.—We object to that as immaterial.

By Mr. VEAZEY.—Will your Honor trust me in this particular this time—

Q. How did you go?

By the COURT.—The trouble is you make it hard
Too much detail. *travelling and*
work, your examination. ∧ This matter of his ∧
is not of consequence.
stopping there for dinner. ∧ It was enough for him to stop there that long, *and to testify he had, to demonstrate his opportunity for observation.* [Corrected by Court] **[156—94]**
and to say so, to show his opportunity for observation,
It was enough for him to stop there that long ∧
detailing he stopped
without ∧ ~~stopping~~ there for the purpose of eating his dinner *or any other reason.* [Corrected by Court.]

Q. How did you go over the country when you would go prospecting for gravel?

A. On a saddle-horse.

Yes, sir, that saddle-horse took me over that crossing. That carcass did not bother my saddle-horse at all as I went over that crossing. At the time of this accident I had entered a homestead. I have a farm, yes, sir.

I haven't had very much experience in handling horses. That was about the only time I handled a horse, when I was prospecting for gravel. I do not know of any instances where a horse, or horses have

(Testimony of John Hamilton.)

been frightened by the carcass of another animal to such an extent that they have run away. I was prospecting for gravel, and I met bones, piles of bones there. They didn't scare my horse there at all, but if there was a moving piece of paper or glass, or anything of that kind, my horse would get scared, but didn't get scared of any bones.

Cross-examination.

Q. That is to say, your experience with horses is that a carcass doesn't disturb them in the least, but anything else would, is that it?

A. Well, yes, that is all.

Yes, sir, I am working for the company. I have been promoted. I am section foreman there now. I was that in 1909. I didn't consider prospecting for gravel a promotion. I was taken from my position as section foreman and put to prospecting for gravel, and then put back again as section foreman. I was taken from my position as section foreman to prospect for gravel shortly before the accident, a few days, three or four days, or five maybe. I got through with prospecting about the first of March. I noticed that there was nothing left but bones before I got back to the section, several days before I got back to the section. Yes, sir, before the first of March there wasn't anything there but a heap of bones. They were piled up together in a bunch after the bones were all scraped together. Some of the bones were attached to the back [157—95] bone, some not. I didn't count how many. After the first

(Testimony of John Hamilton.)

of March there wasn't any flesh there at all that I know.

Q. It really was a desirable place for lunch, near this carcass, wasn't it?

A. Yes, that was in April.

Q. It was a nice place to sit down? A. Yes.

Q. It was a nice place to sit down in April?

A. Yes. Before the accident we were working around the curve, in that vicinity there, and I stopped at the crossing there and ate dinner right on the edge of the road about. It would be sixteen or seventeen feet from the carcass.

Thereupon the defendant rested.

[Testimony of Dr. H. L. Ennis, for Plaintiffs (in Rebuttal).]

Dr. H. L. ENNIS, one of the plaintiffs, being sworn and called in rebuttal, testified as follows in his own behalf:

Direct Examination.

I know where the Lundquist barn is, concerning which the witness Torqueson has testified. I know this road that comes along the Hanson place as it proceeds along towards the track. It would be absolutely impossible for a man standing where Torqueson says he was standing to see a team coming down there. After you leave the Hanson house about ten rods you get into the ravine, and there is a high cut bank between the barn and this ravine that would absolutely preclude the sight from there to the railroad right of way. You couldn't see down there. So, after you get down into the cut, no, sir, there is

(Testimony of Dr. H. L. Ennis.)

no possibility of seeing that team until you get on to the railroad track.

I got home about four o'clock and the accident happened about two thirty; that is what they told me. The team and the wagon were in the barn. Bigelow told me he brought it in.

By the COURT.—Would you say, when you saw him about four o'clock that he was under the influence of liquor or not?

A. I didn't see any indications of it. **[158—96]**

Cross-examination.

I have been up to the Security Ranch many times. Yes, sir, I have been up at the barn and tried to look toward the Hanson house and to see along that road. I have lived there three years and was over that ground daily. As to how often I have gone there for the purpose of seeing whether you could see high enough so that you could tell whether you could see a team or not in that situation, I never went there for that purpose, but I know, as a matter of fact, that you can't see after you leave the Hanson house, driving toward the railroad. It is impossible to see from that barn after the team came in down to that ravine. It is absolutely impossible. As to whether I made any experiment myself of going over there to see whether I could ~~see~~ or not, I know the topography of the ground there, and I know that it would be absolutely impossible. That high cut bank around the bank of that creek cuts off the view of that ravine, and that ravine is deep enough so that you cannot see.

Q. You know, of course, that we have always con-

(Testimony of Dr. H. L. Ennis.)

tended that the team was frightened by that paper, and that the runaway was caused by that paper?

By Col. NOLAN.—We object to that as not proper cross-examination.

By the COURT.—Objection overruled.

A. Why, I have known that there was that kind of evidence put in, yes, sir. I have known of it all the time.

Q. You made no experiment upon the ground there to see whether the horses coming down the hill there could be seen?

By Col. NOLAN.—We object to that as not proper cross-examination.

By the COURT.—Objection overruled.

A. Well, I cannot understand what you want to find out.

Q. Well, the question is whether you went back there and experimented at all by looking down into that bottom for the purpose of seeing whether you could see a team after it got into that ravine?

A. I never went over to the Security Ranch for that purpose, [159—97] but I have been over there, and I know from the lay of the country there that it would be absolutely impossible to see anything from that locality. The barn is on low ground and Miss Hanson's house is on high ground.

Plaintiffs rest in rebuttal.

[Exception Taken at Conclusion of Trial.]

By Mr. VEAZEY.—Might I say this at the conclusion of the trial, and take this exception as regards the conduct of the trial? Your Honor knows that

I have the utmost respect for your Honor in every way—in ability, and in every way, but I do feel that your Honor has ruled against us too frequently, and has hampered us in the examination of witnesses, and your Honor's demeanor towards us may have affected the jury. In the event that the issue is against us, we would like to take the benefit of the advantage of having your Honor review on a motion for a new trial the entire proceedings to determine whether or not we are wrong in contending that your Honor's general attitude throughout the trial was prejudicial to us. If your Honor does not desire us to take the exception we will not take it, but if agreeable to the Court, we desire to take the exception.

By the COURT.—Any exception you have in the record you will be entitled to. You may have any exception you think you are entitled to.

By Mr. VEAZEY.—I would like then to take the exception, so that, if necessary, your Honor can review the matter on a motion for a new trial.

By the COURT.—Very well.

The foregoing is all the testimony introduced upon the trial of the above-entitled cause.

The stipulations under which the depositions, constituting part of the plaintiffs' case, were read in evidence, are as follows: [160—98]

[Stipulations Under Which Depositions Were Read in Evidence.]

IT IS HEREBY STIPULATED that the depositions of Mrs. Charles Allison, formerly Miss Alma Hanson, Katy Meinhardt, Charles Conwell, R. H. Sweetman, Charley Johnson, Charles N. Bain, John

Lundquist and Fred Swant may be taken before William Powers, a United States Commissioner and notary public, at Bainville, Montana, and that, when taken, the said depositions may be used on the trial of said action, subject to the same objections, except as to form of interrogatives, as if said witnesses were personally present and testifying upon the trial of said cause, and that said depositions may be taken in shorthand and transcribed into typewriting, and, when so transcribed, shall be received by said parties and used as true and correct copy of said testimony given at said hearing, and both parties to this stipulation waive the signing of the depositions by the witnesses, subject to all objections except as to form, and subject to any rights reserved in this stipulation.

Said depositions were taken, pursuant to said stipulation, and were properly returned. In said depositions the witnesses Allison and Meinhardt each testified on direct examination as to conversation they had with Mrs. Ennis as to the cause of the runaway, but the Court excluded such testimony as hearsay, and would not allow the same to be read to the jury. Where also in the foregoing Bill of Exceptions the former testimony of a witness appears to have been presented to him by question and answer, the same were read to the witness from a transcript of his former testimony, stipulated by the parties to be correct.

Said cause was at issue only as regards the plaintiffs and defendant Great Northern Railway Company, said cause having been long since discontinued

as to the codefendant John Hamilton, who has never been served with any papers subsequent to the filing of the transcript on removal in this cause, which transcript embraced only the original complaint and the demurrer of the defendant Great Northern Railway Company to said complaint, which said papers were the only pleadings then filed in said cause. **[161—99]**

Instructions Requested by Defendant.

Thereupon the defendant requested the Court to give the said defendant's requested instructions as follows, to wit:

No. 1A. You are instructed to return a verdict for the defendant Great Northern Railway Company.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 1B. You are instructed that the evidence does not show, and is in law insufficient to establish that the defendant Railway Company knew that the carcass referred to in the evidence was an object likely to frighten horses, if such is the fact, and you are not permitted to base your verdict upon that allegation so made in the complaint but not proved by the evidence.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there

duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 1C. You are instructed that the evidence does not show, and that the evidence is in law insufficient to establish that the defendant Railway Company knew, or in the exercise of reasonable diligence should have known that the carcass, referred to in the evidence, was an object likely to frighten horses, if such is the fact, and you are not permitted to base your verdict upon that allegation so made in the complaint but not proved by the evidence.

Which said instruction was by the Court refused, to the [162—100] refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 1D. You are instructed that the evidence fails to disclose, and is in law insufficient to establish that the defendant Railway Company placed the carcass, referred to in the evidence, at or near the place charged, and you will, therefore, disregard the allegations of the complaint to the effect that the defendant Railway Company placed the carcass anywhere, and you cannot base your verdict upon this theory of the plaintiff's action, which has been charged by them but which they have failed to prove.

Which said instruction was by the Court refused, to the refusal to give which said instruction as ten-

dered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2A. You are instructed that even if the proof discloses that the defendant Company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that, at the time of the runaway, the defendant Railway Company was absent, and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, if any, and had the last clear chance, by the exercise of reasonable care, to avoid such negligence, if any, and failed to do so, and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof, and the death of the deceased was not [163—101] proximately caused by such negligence, if any.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2B. You are instructed that, even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the

uncontradicted evidence establishes that, at the time of the runaway, the defendant Railway Company was absent, and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, or by the exercise of reasonable care might have discovered the same, and had the last clear chance, by the exercise of reasonable care, to avoid such negligence, if any, and failed to do so, and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof, and the death of the deceased was not proximately caused by such negligence, if any.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2C. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place, and is no longer present, and someone approaches such place and discovers, or by the exercise of reasonable diligence might have discovered, the negligence of such defendant, and [164—102] has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers, but a

mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause, and in the occurrence of which its negligence was merely a condition or circumstance.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2D. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place and is no longer present, and someone approaches such place and discovers the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers, but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause and in the occurrence of which its negligence was merely a condition or circumstance.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there

duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows: **[165—103]**

No. 2E. Even if you find that the defendant railway company was negligent in any of the matters complained of, nevertheless you cannot return a verdict for the plaintiffs if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees knew, or discovered, or in the exercise of reasonable care should have known or discovered, said negligence, if any, of said defendant, and had the last clear chance to avoid the same and negligently failed to avoid the same. If such is the case, then the negligence, if any, of said defendant is in law but a condition surrounding the accident and not, in law, a proximate cause of the accident, for no one is after discovering, or having the means of discovering, that another has been negligent, entitled to thrust himself upon the negligence of another or blindly refuse to discover the negligence of another, and if he does so, it is, in law, his own act or omission, and not the negligence of the defendant, which is the proximate cause of the injury.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2F. If you find from the evidence that the defendant railway company placed, or negligently permitted to remain, at the place narrated in the complaint, the carcass of a horse so that it was an object likely to frighten horses driven upon the roadway in question, such negligence, if any, on the part of said defendant would not be a proximate cause of the runaway and of the damages, if any, caused by the death of the deceased, if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees knew of and discovered said [166—104] negligence, if any, or by the exercise of reasonable care should have known or discovered the same, or had the last clear chance to avoid the same and negligently failed to do so. Under such circumstances the negligence, if any, of the defendant railway company would be a mere condition or circumstance of the runaway but not a cause thereof.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 3A. You are instructed that under the evidence in this case the driver John Bigelow was the agent or employee of the deceased and of Dr. Ennis, one of the plaintiffs, and knowledge, if any, or means of knowledge, if any, on his part is deemed in law knowledge or means of knowledge on the part of the

deceased and of Dr. Ennis, and his acts or omissions, if any, in the performance of his agency and employment, and within the scope of the same, are, in law, acts or omissions, if any, for the consequences of which, if any, the deceased and said Dr. Ennis are bound and affected to the same extent as if they, or either of them, had personally partaken in such acts or omissions, if any.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 4A. You are instructed that the evidence does not show, and is legally insufficient to establish, that the place where said Nettie Ennis and John Bigelow attempted to drive across [167—105] the railroad track of the defendant railway company was anything other than a roadway by invitation of the railway company.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 4B. The railway company was not, in any event, under any absolute duty to remove the carcass in question, if you find that the carcass caused the

runaway; it was at least under not more than an alternate duty, that is to say, to exercise reasonable care to remove the carcass, or to exercise reasonable care to give warning of dangers, if any, which might arise from its presence, if you find that such dangers existed. And, in this connection, a knowledge by any person of such dangers, if any, or the fact, if it is a fact, that, in the exercise of reasonable care, such person would know of such dangers, if any, would dispense with any necessity of giving such person warning.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 4C. Before the plaintiffs can recover in this case, it must be established by a preponderance of the testimony that the runaway was caused by the horses taking fright at the carcass, that the carcass was an object not only capable of frightening horses but also an object of such a nature that it would be likely to frighten horses, and this also to such an extent as to cause them to run away, and that defendant railway company knew this, or in [168—106] the exercise of reasonable care should have known it, and that the circumstances were such that defendant was under a duty to remove the carcass and negligently failed to do so. In addition the plaintiffs cannot recover, even if you find these

things to be true, if you further find that the driver or Doctor Ennis knew, or in the exercise of reasonable care would have known of these dangers.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duty excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 4D. You are instructed that under the evidence in this case the defendant railway company was, as regards that portion of the roadway crossing its tracks and on its property, entitled to have there such articles or objects as it saw fit provided that it gave warning thereof to persons using the crossing, and, in the event that any such person knew of the presence thereof, and of the dangers, if any, flowing therefrom, this would dispense with any duty to give warning as to such person, and such person using the crossing with the knowledge aforesaid would do so at his own risk, if any, and defendant could not be liable to him for damages, if any, thereby sustained.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 5A. The measure of damages in this class of suits is the pecuniary injury or damage, if any, sustained by the heirs; that is to say, before you can allow the plaintiffs any compensation for '[169—107] injury or damage, if any, sustained by them you must first find by a preponderance of the evidence that such injury or damage, if any, has a pecuniary or money value, that is to say, that its value can be measured in money. If, therefore, in considering items of damage, if any, you find that such items of damage, if any, are incapable of being measured in money, or that as the result of any award of money to the plaintiffs for such items of damage, if any, the plaintiffs would be richer, or would profit in a pecuniary or money way by the death you must not allow anything for such items of damage, if any. It is only in so far as you may find that the preponderance of the evidence establishes that damage, if any, has been sustained by the plaintiffs and that the extent or value of the net loss, if any, to the plaintiffs can be estimated in money, so that as the result of your verdict in the event that it should be for the plaintiffs, the plaintiffs would be neither richer nor poorer from a pecuniary or money point of view alone as the result of the death, that you can give any compensation to the plaintiffs for the death.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 5B. The measure of damages in this class of suits is the pecuniary injury or damage, if any, sustained by the heirs; that is to say, before you can allow the plaintiffs any compensation for injury or damage, if any, sustained by them you must first find by a preponderance of the evidence that such injury or damage, if any, has a pecuniary or money value, that is to say, that its value can be measured in money, and for any items of damage, if any, which have no pecuniary value, you can make no allowance. [170—108]

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 5C. Plaintiffs allege in their complaint that by the death of said Nettie Ennis, the plaintiff Herbert L. Ennis has been deprived of the comfort, society and association of his wife, and the said Guy W. Ennis has been deprived of the care, supervision and attention of a mother. You are instructed that, as regards these items of damage, the alleged loss, if any, to the plaintiff Herbert L. Ennis of the comfort, society or association, if any, of his wife, and the alleged loss, if any, to the plaintiff Guy W. Ennis of the care, supervision or attention, if any, of his mother no recovery can be had, except in so far

as such comfort, society or association, or such care, supervision, or attention, if any, has a pecuniary or money value; that is to say, that the value of such comfort, society or association, or the value of such care, supervision or attention, if any, can be measured in money. For example, if, by the death of a parent, a child is deprived of the association, care or supervision of a parent, this loss may include instruction, if any, which would probably have been given, we may assume in a given case, to a child by the parent, and this instruction may have a pecuniary value, and to this extent a recovery could be had by the child for the net pecuniary value of such instruction; but no allowance can be made for any item of damage, if any, represented by loss of comfort, society, association, care, supervision, or attention, if any, in this case unless you find from a preponderance of the evidence that the same was of such a character, or of such a nature that it has a pecuniary value, and then only to the extent that the same has a pecuniary value. **[171—109]**

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

(Here will be inserted the Court's ruling endorsed on the back of rejected instructions. By the Court.)

Said endorsement is as follows:

"39 offered. Many various renderings of same principle. The Court has selected from the mass

several, but declines to further examine and speculate which others it should give.

BOURQUIN, J."

Thereupon the cause was argued to the jury by counsel for the respective parties, the plaintiffs and the defendant Great Northern Railway Company, and at the close of the argument the Court gave to the jury its charge as follows:

Instructions.

Gentlemen of the Jury:

The Court will now deliver to you its instructions; that is to say, it will very briefly recall the issues to your mind. It may be it may make some comment upon the evidence, and it will state to you the rules of law that should govern you in determining what your verdict will be in this case.

In this case, as in all cases before you, when the case is left to you to pass upon, you take the law from the Court, and that is so that the law will always be the same. The Court always gives the law the same, and if the jury takes its own view of the law, why, one jury might take one view, and another jury might take another view in a like case, and we would never know what the law was, nor would litigants know what the rules of law were, or generally are. If the Court should make a mistake in the law, it will be in the record, and it can be corrected; but if you make a mistake in the law, it is locked up in your mind, and there will be no opportunity to make the correction. But when it comes to determining what facts are proven, and what issues of fact are proven, that is exclusively for you to determine in a

case such as this. You determine what witnesses tell the truth, how much weight you will give to their evidence, how much credibility the witnesses are entitled to. The Court may express an opinion upon those facts, but you are not bound to take the Court's opinion of [172—110] the facts. You are bound by the Court's opinion of the law, but not of the facts. If your opinion coincides with the Court's view of the facts, why, of course, you should follow it, because you are following your own opinion of the facts.

This is a case for what is termed in the law "wrongful death."

The plaintiffs in the case charge that prior to April, 1909, a certain roadway crossed the right of way and tracks of the defendant railway company which was used by the traveling public, and it is alleged that the defendant company placed and permitted and allowed to remain on its right of way near where said roadway crossed the same, the carcass of a horse, so that it became a public nuisance, and the carcass so remaining there in proximity to the roadway, became and was such an object as to frighten teams driven on the roadway, and that the defendant company knew this, or in the exercise of reasonable diligence should have known it, and that on the 18th day of April, 1909, one Nettie Ennis, wife of the plaintiff, Herbert L. Ennis, and mother of the plaintiff, Guy W. Ennis, had occasion to use the roadway, and so using it, was riding in a buggy to which was attached a team of horses driven by one John Bigelow, which team was then, and at all times,

gentle and tractable, and that the team so driven, when at or near the point on said roadway where the said carcass was, became frightened by said carcass, and so becoming frightened, started to run away, and did run away, and said Nettie Ennis was thrown bodily from the buggy, receiving injuries from which she thereafter died, and through the death of said Nettie Ennis, the plaintiffs, as husband and son, have been deprived of the comfort, society and association of Mrs. Ennis, as wife and mother, and have, likewise, been deprived of her services, to their damage, as it is alleged, in the sum of twenty-five thousand dollars. This the defendant denies, namely that it placed this carcass there, or that it allowed it to remain there. [173—111] It denies any responsibility for that, and denies that it was negligent at all in connection with this carcass. It furthermore sets up a plea of contributory negligence, that is to say, it alleges that if it was negligent in and about the situation of this carcass, that when the plaintiffs' driver Bigelow took the wife through that place, he was negligent in his driving, and that this negligence contributed to the injury, and without his negligence the injury would not have happened.

Briefly the issues in this case are: Is the defendant responsible at all for the placing of this carcass at the place where the evidence shows it was? In brief, it might be, did the defendant's railway train kill and throw this carcass in that position along this roadway? If that issue is determined against the defendant, then the next question would be, whether or not in so allowing it to remain there, the defendant

was negligent. In other words, did it act as a reasonably ordinary prudent man would act under like circumstances? Was this carcass at that time and place, in April, 1909, an object, in its appearance, or by reason of odors arising from it, if any did, that would be likely to frighten ordinary teams passing along the roadway at that time? If you should determine that question against the railroad company, then the question would be possibly, whether or not the driver Bigelow drove over there in the exercise of ordinary reasonable care on his part; and then finally might be, the amount of damages, if you find for the plaintiffs, that the plaintiffs have suffered by reason of the acts of the defendant.

As the question is one of negligence of the railroad company, the Court will say to you that negligence is the failure to do what the average reasonable and prudent person would ordinarily have done, under all the circumstances, or doing what such a person under all the circumstances would not ordinarily have done. You cannot, therefore, find the defendant railway company guilty of [174—112] negligence, unless you find that the conduct of the said defendant was inconsistent with the ordinary conduct of the average reasonably prudent person under all the circumstances. In other words, the test as to whether or not the said defendant has been negligent in the respects at issue in this case, is not what a reasonably prudent and diligent person could or would have done, or omitted to do, but what the average reasonably prudent and diligent person ordinarily would have done, or omitted to do under the circum-

stances of this case.

In this case, it appears that there was a traveled way along the railroad track, across the railroad track; that it was generally treated in the community as a public highway; that the people who had occasion to travel that way used it; that the county authorities treated it as a highway, maintained it as such, and at the point where it crosses the railroad track, the railway company had planked the way, making it easier to cross, and they had put up cattle-guards as is customary, on each side of the railroad, and these cattle-guards had run out to the side fences, the same as on highways. The Court will say to you that while this was not a legal highway, in that it had not been laid out by the county, with all the requirements of the law, as it is agreed, by the authorities, yet to all intents and purposes, this was a public highway, and imposed upon the defendant the same duties in relation to it that would be imposed upon it in connection with a legal highway, and conferred upon the plaintiffs, and the deceased woman, the wife of Herbert L. Ennis, the same rights to travel that she would have to travel on any public highway. Now, the law is that no one can cast obstructions in a public highway, and endanger the safety of travelers thereon. If they do that, if it is negligence under the circumstances, if they obstruct the roadway so that it is not reasonably safe for travelers to pass over, and if, and because thereof, travelers traveling over it in the exercise of [175—113] ordinary care for their own safety are injured, then a party who has thus obstructed the highway is liable in damages

for whatever damages have been suffered by reason of the accident.

In this case, if you find that the defendant had killed this horse by one of its trains, and threw it down below the travelled part of this sixty-foot highway across its line, and left it there from January or December, until April, and that when April came, on the day when this lady was crossing there, the appearance of the carcass, and the odors from it were such as tended to frighten the ordinary teams that would pass over the highway, and teams of ordinary gentleness and training, why, you would be justified in finding that the defendant was negligent in leaving the carcass there, under those circumstances.

You have a right to consider, in arriving at this, all the circumstances, to call upon your ordinary judgment, as men, in reference to the likelihood, and the tendency of this carcass, in the condition that the witnesses have told you it was on the 18th of April, 1909, and the odors which would likely arise from it, if it was in that condition, you have a right to call upon your ordinary judgment to determine as to whether or not it had a tendency to frighten teams, as I have stated to you; and if it had such tendency, then the railroad company was negligent.

The Court will say to you, as to the condition of the carcass, that there is some dispute amongst the witnesses as to its condition at that time, and that condition is for you to determine—where the truth lies in respect to that matter. Even if you should find that this carcass at that time and place was in such a condition that it had this tendency to frighten

ordinary horses, and if the defendant company was negligent, then there might be a question in this case as to whether or not there would be an issue in this case whether this negligence caused the team to run away, and injure, and afterwards thus kill the wife and mother of the plaintiffs; [176—114] because when a party is negligent in any manner it does not follow that they are liable, unless that negligence is the proximate cause of the injury to some other person—in this case, these plaintiffs' deceased wife and mother.

The proximate cause, to be the proximate cause of the injury to the lady, why, it would be the cause that directly, and without any intervening responsible cause, caused the team to run away and throw the lady out to her injuries.

There has been evidence that as the team approached the place where this carcass lay, it had already been frightened by paper flying across the road, and the team, by reason of this paper fluttering before it, had run away,—run across the track, and upset the buggy, and injured the lady, from which injuries she died. Now, if that is the situation, if that is the case, if it was the paper that caused the team to run away and throw Mrs. Ennis out to her death, why, of course, this defendant is not liable here. Whether or not it was the paper, or whether it was the carcass itself, is for you to determine.

I will say to you as to this issue, whether or not the defendant placed this carcass there at the time and place, and allowed it to remain there, placed it as I have said, killing it, or by knocking it and throw-

ing it and leaving it there, the burden of proof is upon the plaintiffs. It must satisfy you by a preponderance of the evidence that the railroad company killed and threw it there. If it did kill and throw it there, and did leave it there,—there is no question about that—when I say that that must be proved to you, by a preponderance of the evidence, I mean by the greater weight of the evidence. Does the weight of the evidence show to you that the defendant company had killed and thrown that horse there? So with respect to what frightened the team, and caused it to run away and tip the buggy over there, and throw Mrs. Ennis out, the burden is on the plaintiffs to prove that to your satisfaction by a preponderance of the evidence, that is, the **[177—115]** greater weight of the evidence. If upon that point, you are in doubt as to whether it was the paper that caused the team to run away, and caused the accident, or whether it was the carcass, its appearance, and the odor from it that scared the team, and caused the accident, then, of course, you could not find for the plaintiffs; you would be bound to find for the defendant, because the plaintiffs would not have sustained, proved their case, to your satisfaction by the greater weight of the evidence; and if you believe the evidence on that point is equally balanced, you would be bound to find for the defendant, because the plaintiffs would not have sustained, proved to your satisfaction by the greater weight of the evidence, that the defendant was negligent in that respect; and if you believe the evidence on that point is equally balanced, you would be bound to find

for the defendant, because the plaintiffs cannot ordinarily sustain this action except by proving to your satisfaction by the greater weight of the evidence, how the accident happened. You can all understand that. No one is to be deprived of property, or to pay for accidents unless they are responsible; and they are not responsible unless it is proven to your satisfaction by a preponderance of the evidence, by the greater weight of the evidence, that they are the responsible parties.

There is also evidence tending to show that as the team approached the crossing, it was frightened by a piece of paper, but that the driver got it under control, and that, just as he was coming up to the crossing, the wind blew so that the odor from the carcass reached the team, and set it off, and it rushed across the crossing, and because of the cramped situation there, it ran into the fence and upset the buggy, and injured the lady. It seems as if when the team came from where it had been frightened by that paper, wherever it was, and approached the crossing, the carcass lay on the other side of the crossing ahead of the team, and in a depression alongside the road. Whether the team could actually see [178—116] it from that point, whether or not if it did see it, it would have rushed across the crossing in the face of the carcass is a circumstance that you may consider in determining the truth here. It may be that even after the team saw the carcass, and if it did not, even had the odor of it, and was yet under the control of the driver, instead of wheeling around, it might have tried to shoot across the way, and past the carcass,—

those are also circumstances for you to consider, and points for you to determine.

Now, at this point, comes this proposition: The issue in reference to the contributory negligence alleged against the driver Bigelow and, in reference to that, all the Court has heard in the way of evidence is that Bigelow had been drinking that day, a drink or two, seems to be all the direct evidence. Possibly you would say one drink is all that is actually proven; but it is for you to say because the witness Hubener was the defendant's witness, and if he is in doubt, you have the right to take the most favorable view of the evidence for the plaintiffs. There is other evidence that witnesses smelled liquor on Bigelow's breath, saw a bottle in his pocket. They do not describe the bottle, but, perhaps, under all the circumstances, it would be a fair inference that it was a bottle of liquor of some kind. Outside of this, the evidence shows there were other horses which passed there, and had not been seriously frightened, and you would have a right to infer that it would not frighten horses that were driven with ordinary care. There is not much evidence from which you might infer negligence on the part of Bigelow; at the same time the Court will leave it to you to say, under proper direction, as to the charge against Bigelow. The charge, of course, would be thrown over to these plaintiffs as to whether Bigelow was negligent himself. Contributory negligence means that a party who is laying a claim against another person for his negligence, was himself lacking in ordinary care due for his own safety, under

the circumstances, and that, because of that, contributed to [179—117] his injuries. In other words, if he had not been negligent, the injury would not have happened; that even though the defendant company was negligent in leaving the horse there, and even though it frightened the team, yet if Bigelow had driven with ordinary care, and thus prevented the accident—and could have prevented the accident that happened, why then his negligence contributed to the injury; and since he was the servant of Mr. Ennis and Mrs. Ennis, they would not be entitled to recover in this case. Now, that is for you to determine. Now, this condition the defendant must prove, and prove to your satisfaction by a preponderance of the evidence, even as the plaintiff has proved the other issue. If upon the question of the negligence of Bigelow, you are in doubt, or if you believe the evidence on that point is simply evenly balanced, then the defense has not proved it, and then you put the question of contributory negligence out of sight, and should not allow it to influence you in the final determination of this case.

In my opinion, the evidence of contributory negligence would be very slight. But you are not bound by that opinion. You have a right to infer it from the fact that Bigelow had some drinks; but I imagine most men take a drink or two occasionally, and the question is whether that incapacitated him so that he, when driving across the crossing, where the carcass was, was not acting as a reasonably prudent man should. Unless you find by a preponderance of the evidence that he did not so drive, why, you put the

question of contributory negligence out of sight.

I have here a written instruction upon the question of this highway, which I will read to you.

If you find from the evidence in this case that the roadway which crossed the right of way of the defendant company was one which was used by the public as if it were a public highway, and was treated by the public authorities, having to do with the maintenance of public highways, as if it were a public highway, and if you likewise [180—118] find from the evidence that the defendant company treated it, as it crossed its right of way, as if it were a public highway, and invited the public to use it as if it were such, in that event, the defendant company would be held to the same accountability in seeing that no nuisance was maintained thereon, as if it were a public highway, and if you find from the evidence that the defendant company treated it as if it were a public highway, and placed, and allowed to remain on its right of way at or near such roadway, the carcass of a horse, which, in form, and by reason of the odor that it exhaled, was such an object as was likely to frighten horses driven along said roadway by the traveling public, then the existence of such a carcass in such a condition, would be a public nuisance, and for any injuries done to the public so using said highway by such roadway by such an object, the defendant company would be liable.

The Court will say to you, however, that so far as this case is concerned, the animal was not on the right of way, but was on this roadway, because you must treat it as a roadway for all the purposes of this case.

The legal effect is just the same; in so far as this case is concerned, if the defendant placed it there, whether it was on the roadway, or on this highway, would be an immaterial matter. If you find, then, that the defendant company placed this horse at the point where it has been testified to before you and left it there, that, under all the circumstances, was negligence, as the Court has defined negligence to you; and if you find that by reason of that carcass being there, this accident happened to Mrs. Ennis, that is to say, that it frightened the team, and caused the runaway, and the throwing out of Mrs. Ennis, with the result of death, and if you find Bigelow was not himself guilty of negligence in driving across the road at the time and place charged, and contributed to the injury of Mrs. Ennis, then you come to the proposition as to the amount of damages which you will allow these plaintiffs. [181—119]

Upon the matter of damages, the Court will say to you that when the death of one person is caused by the wrong or the neglect of another, his heirs may maintain an action for damages, if any, sustained by them by reason of the death.

The object of the law is not to enable the survivor to make profit, if any, out of the suffering, if any, or other damage, sustained by the deceased, but solely to compensate the survivors for the damage, if any, sustained by them, to the end that they may receive compensation for any loss, if any, sustained by them, but without their making profit, if any, out of the death. In the event, therefore, that you find a verdict for the plaintiffs, in assessing their

damages, if any, you will bear in mind these important principles that you are not permitted to allow compensation for damage, if any, sustained by the deceased, but only for the damages, if any, sustained by the plaintiffs, and you will award to the plaintiffs only such a sum as will, in accordance with the Court's instructions, constitute compensation to them for the damages, if any, sustained by the plaintiffs themselves, as the result of the death, as such items of damage, if any, are itemized, and the measure thereof defined in the instructions of the Court.

The plaintiffs itemize their damage in the complaint as follows: They say that by the death of said Nettie Ennis, the plaintiff Herbert L. Ennis has been deprived of the comfort, society and association of his wife, and that the plaintiff, Guy W. Ennis has been deprived of the care, supervision and attention of a mother, and that both of the plaintiffs have been deprived of the services of the said Nettie Ennis. You are instructed that in the event that you find a verdict for the plaintiffs, you can award them no item of damage, if any, except those which they have alleged that they have sustained as just outlined, and compensation can be awarded as to these items of damages, if any, only in accordance with the limitations given you by the Court in its instructions. **[182—120]**

That for any distress or injured feelings, if any, caused by a death, no compensation can be awarded. It is impossible to estimate in money the extent of such damage, if any, and the law will not undertake to even endeavor to give any money compensation

for that which, in its very nature, is incapable, when it exists, of valuation by any money standard. You are, therefore, instructed that no compensation can be given for damages, for distressed or injured feelings, or grief on the part of the plaintiffs.

In considering the loss, if any, of the plaintiffs, by reason of the death of said Nettie Ennis, you are instructed that due allowance must be made (by way of reduction of any sum that you would otherwise award to the plaintiffs) for any and all reasonable and necessary costs or expense which the plaintiffs might be compelled to incur, would be compelled to incur, if any, in order to secure the services, if any, of said Nettie Ennis, had she lived; such as all reasonable and necessary costs, or expenses, if any, of food, clothing, shelter, and all other reasonable and necessary expenses, which you may find the preponderance of the evidence establishes, if any, that the plaintiffs would probably have reasonably or necessarily expended upon the said Nettie Ennis for her maintenance, support or comfort, and all such sums, if any, must be deducted, before your verdict is finally reached, in the event that your verdict may be for the plaintiffs; in other words, as regards the amount of your verdict, in the event that you find for the plaintiffs, the question is, as regards the damages, if any, of the plaintiffs, what is the net loss, if any, which the plaintiffs will suffer by reason of the death of said Nettie Ennis.

The case is precisely the same. It is an unusual case. There has never been any case passed on by the Supreme Court of Montana, that I know of, and

possibly not any in any of the appellate courts. The case is precisely as if the plaintiff, Mr. Ennis, had lost the son, instead of a wife. The damages are to be measured by **[183—121]** his pecuniary loss what her services are, her association, her companionship, her society, her aid and encouragement would have been to him, in a pecuniary way; it is precisely as in the loss of a son. The husband is entitled to the services of the wife, just as he would be entitled to the aid of a son, if he had arrived at the age of twenty-one years.

The plaintiffs charge that by reason of the death of said deceased, they have been deprived of the services of said Nettie Ennis. As regards this item of damage, to wit, the alleged loss of the services of the said Nettie Ennis, you are instructed that in the event you should find a verdict for the plaintiffs, you can allow them such a sum, if any, as compensation for the item of damage, if any, as would be represented by the difference between the costs, if any, which the plaintiffs would reasonably and necessarily be obliged to incur to secure similar services, if any, by employing some other person to perform such services, and the costs, if any, which the plaintiffs would reasonably and necessarily be compelled to incur to secure the services of the said Nettie Ennis, had she lived.

The Court will say to you, however, that the value of the services of a wife in the household are not to be measured by what it would cost to replace her mechanical services by a domestic servant. That is not at all the rule. You can have in mind what it

would cost to secure the mechanical work which this lady would have done, and you have a right to consider in that the fact that she was the wife, and the counselor and advisor of her husband; that she was a helper to him, that her society was his, that he was entitled to it, and the fact that her companionship might inspire in him greater efforts in his own behalf, and all these matters you have a right to take into consideration to determine the pecuniary loss to these plaintiffs by the death of Mrs. Ennis.

If you find for the plaintiffs then you should assess their **[184—122]** damages at such sum as will reasonably compensate them for the loss they have sustained, and in determining that loss, you may take into consideration the society of which they have been deprived through the death of Mrs. Ennis. You may also take into consideration the loss which they have sustained on account of the services of which they have been deprived through her death.

There is no evidence in this case that the deceased Mrs. Ennis, rendered any services to her son, so that in estimating his loss, if any, you will take into consideration the value of the society, the comfort and association of which he has been deprived through the death of his mother, and fix upon it, if it is of any pecuniary value to him, such value as in your honest judgment attaches thereto.

In estimating the loss, if any, which her husband has sustained, you may take into consideration the society, the comfort, the association and companionship of which he has been deprived, as well as the loss of the services, if any, thereby.

The law in a case like this is somewhat peculiar. It is apparent obvious that the husband has suffered more than the son has suffered, in a case of this kind, and yet the jury may not apportion them in that verdict. When the verdict comes in, it is a single verdict and the husband and the son will share the damages equally. At the same time, however, you have in mind the difference, in damages, if you find there is a difference, and simply make your verdict a total of what in your honest judgment the husband has suffered, and how much in addition, the son has suffered.

The Court will say to you that in estimating the damages as in a case like this, no uniform rule is possible; but all the jury can do is to take into consideration the matters going to make the life of the deceased woman, the pecuniary, that is the money, value to the plaintiffs. In a case such as this, very much depends upon your good sense and your sound judgment, in view of all the **[185—123]** circumstances of the case. You are to endeavor to be fair, to be just, and not moved by sympathy nor excited to increase the just damages by the grievous situation in which the plaintiffs, the husband in particular, have been left. You are to determine the pecuniary loss, the money loss that these plaintiffs have suffered. If you find that the plaintiffs are entitled to a verdict, that amount, reasonable and fair, you are to write into your verdict, if you find such.

When you retire to your jury-room you should select one of your number as your foreman, who will sign the verdict.

Twelve of your number must agree upon any verdict that you may render.

Objections and Exceptions to Instructions.

Thereupon the defendant duly objected and excepted to the Court's instructions as follows:

By the COURT.—Have the plaintiffs any exceptions?

By Col. NOLAN.—No exceptions.

By the COURT.—The defendant.

By Mr. VEAZEY.—There are one or two. The Court will remember, one was the instruction to the effect that the test was as to whether the carcass was likely to frighten horses. I think that should be frighten horses to such an extent as to cause them to run away.

By the COURT.—Oh, certainly, the Court has stated that.

(The Court addressing the jury.) The jury will understand the test is whether the carcass in its then condition, appearance and odor, if any, was such as was likely to frighten teams of ordinary gentleness and training, to an extent that it would do damage to those in charge of that team,—frighten them so that they would run away, and so do injury. Of course, if there was some shying, from which no injury would follow, naturally why, that is not what is meant by frightening a horse to an extent that would cause the defendant to be negligent by leaving the carcass there.

By Mr. VEAZEY.—That being so, I withdraw my objection.

Further, there was one where the Court instructed

the jury that if it had that tendency the railroad company **[186—124]** would have been negligent. We contend that the jury should be instructed that it would also be necessary for the plaintiffs to establish that the railway company knew of this tendency, or, in the exercise of reasonable care, should have known it.

By the COURT.—Well, the test will be whether a man of average common sense would know that it would have a tendency to frighten animals at that place. And if it would, if the average reasonable man would know it, then the defendant company would be taken to know it.

Of course, if it is an unusual circumstance, something that no reasonable man would expect to follow from leaving the carcass there, that is a different proposition. The defendant would not be liable; but it is left to your sound sense and judgment to say whether or not in that condition at that time and place and under the circumstances of the road crossing, whether or not the average reasonable man would know that this was a dangerous object, as I have defined it; if so, the railroad company would be liable, otherwise not.

By Mr. VEAZEY.—I should like to take an exception as regards that, on the ground that your Honor has said that that would be the fact whether or not the railroad company should have known of the condition there. Your Honor should charge, in addition to what your Honor has said, that the railway company would not be negligent unless, in its situation, it knew, or should have known, of the alleged

fact as to the tendency of the carcass.

Which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—The others relate merely to exceptions as regard to what your Honor and I would differ upon as to the law. I would call your attention to them. One exception is, there is no instruction on what would be the measure of duty in the event the jury should find that this was merely an invited way.

By the COURT.—We differ on the law there. I think you have saved that point by your peremptory instruction.

Which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—Then there is another instruction. In regard to the placing of the carcass. Your Honor has instructed the jury that **[187—125]** if the carcass was placed there by being struck with a train, that would consist of the act of placing the carcass. We except on the ground that the act of placing the carcass has not been proven, there is no proof of such a fact.

By the COURT.—Your exception will be noted.

By Mr. VEAZEY.—We also except on the ground that we should not be liable for the placing of the animal, unless we were negligent in the placing, in the first place; that is, unless it amounts to negligence in the operation of the train that struck it.

By the COURT.—Your exception will be noted.

By Mr. VEAZEY.—We except further on the ground that the instructions do not cover all of the

issues. Our contention is that no one has a right to thrust himself upon the negligence, if any, of another. The answer specially pleads that, that whatever dangers there were existing, the plaintiffs, or their representative knew, and at least had the last clear chance to avoid it in the exercise of reasonable care; and the proof shows that there were other ways by which the Ennis ranch could be reached, and the instructions do not cover that phase at all.

Your Honor has limited the issue of contributory negligence to the manner of driving, and has not charged the jury as to the duty of the driver or the plaintiffs in any way to avoid the alleged negligence of the defendant, not only in the manner of driving, but by using another road, or in any other respect. In fact, the Court charges the jury that the last clear chance doctrine as regards the plaintiffs' negligence, and any negligence of the driver, other than his manner of driving, may be laid aside.

By the COURT.—In the light of the testimony as to the use made of the road, I do not think the driver was bound to use another road; by placing the carcass there you cannot foreclose him from using that road. Your exception will be noted.

Let each and all of the exceptions be noted.

By Mr. VEAZEY.—I have assumed that each party has an exception to each instruction refused. **[188—126]**

By the COURT.—If you take it.

By Mr. VEAZEY.—We take an exception as to each instruction refused.

By the COURT.—Your exception will be noted.

Thereupon the jury retired to consider of its verdict, and thereafter returned into court with its verdict in favor of the plaintiffs and against the defendant, and assessing the plaintiffs' damages in the sum of Eight Thousand Dollars ($8,000).

Thereafter, by stipulations of the parties and by orders of the above-entitled court, duly given and made, the time within which defendant might prepare and serve its bill of exceptions was extended to and including October 10th, 1914.

And now, therefore, in furtherance of justice, and that right may be done, the defendant presents the foregoing as and for its bill of exceptions to the rulings made and the proceedings had on the trial of the above-entitled cause, and prays that the same may be settled and allowed, and signed and certified by the judge of the above-entitled court, who tried said cause, as provided by law.

VEAZEY and VEAZEY,
Attorneys for Defendant, Great Northern Railway Company.

Admission of Service of Bill of Exceptions.

DUE PERSONAL SERVICE of the foregoing bill of exceptions made and admitted, and receipt of copy, acknowledged this 10th day of October, A. D. 1914.

R. O. LUNKE,
WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs. **[189—127]**

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULAT*ION* AND AGREED that the foregoing bill of exceptions is true and cor-

rect, and that the same may be settled and allowed, and signed and certified as defendant's bill of exceptions to the rulings made and proceedings had on the trial of the above-entitled cause.

Dated January 2d, 1915.

WALSH, NOLAN and SCALLON,
Attorneys for Plaintiffs. [190—128]

In the District Court of the United States for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY CO. et al.,

Defendants.

Order Settling and Allowing Bill of Exceptions.

This cause coming on regularly before the Court upon the application of the defendant, Great Northern Railway Company, for the settling and allowance of its proposed Bill of Exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of the Court, and the plaintiff, by his attorneys, having proposed amendments thereto and said amendments adopted by the Court having been incorporated in said bill;

It is now ordered that the foregoing Bill of Exceptions be and it is hereby settled and allowed as a true Bill of Exceptions in this cause as prayed, and the same is now certified accordingly by the undersigned, the presiding Judge of said court, who tried

said cause, and it is ordered that the same be filed *nunc pro tunc* as of July 2d, A. D. 1914, and made a part of the record herein.

Done in open court this 2d day of January, A. D. 1915, and ordered entered as above.

GEO. M. BOURQUIN,
United States District Judge for the District of Montana.

After hearing defendant's argument on motion for a new trial made immediately after the above certificate signed, and **[191]** discovering the chief ground relied upon, the Court examined the bill and finds it defective, incomplete and unsatisfactory. It has corrected it in several particulars, pages 61, 69, 70, 88, 93, 94, 95, 110, but the instructions especially are subject to the above criticism, though doubtless not to be remedied. The Court knows the great difficulty the stenographer has in noting the Court's remarks, and the greater, transcribing them. The Court's earlier certificate is to be read herewith.

Jan. 12, 1915.

BOURQUIN, J.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Filed Jan. 14, 1915. Geo. W. Sproule, Clerk. **[192]**

Thereafter, on March 10, 1915, defendant Railway Company filed its Assignment of Errors herein, as follows, to wit: [193]

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Assignment of Errors.

Comes now Great Northern Railway Company, the defendant in the above-entitled cause and, pursuant to its petition for a writ of error, filed herein, makes and files this its assignment of errors setting forth why the judgment herein should be reviewed on writ of error and reversed, and says that the Court was in error in the particulars following and that it, the said defendant herein, plaintiff in error in the Circuit Court of Appeals, will rely upon the following errors in the prosecution of said writ, to wit:

I–A.

It was error in the Court to overrule defendant's motion to strike certain portions and the whole of plaintiff's First Amended Complaint.

I–B.

It was error in the Court to overrule defendant's motion to strike certain portions and the whole of

plaintiff's Second Amended Complaint.

II–A.

It was error in the Court to overrule defendant's demurrer to the Second Amended Complaint herein.

II–B.

It was error in the Court to overrule defendant's objection to the introduction of evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. **[194]**

II–C.

It was error in the Court to overrule defendant's motion for a nonsuit at the close of the plaintiffs' case.

II–D.

It was error in the Court to refuse defendant's request for an instruction to return a verdict for the defendant.

II–E.

It was error in the Court to refuse defendant's requested instruction numbered 1A, as follows:

"No. 1A. You are instructed to return a verdict for the defendant Great Northern Railway Company."

III–A.

It was error in the Court to refuse defendant's requested instruction numbered 2A, as follows:

"No. 2A. You are instructed that even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that at the time of the runaway the defendant railway company was absent and that Dr. Ennis, one of the

plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, if any, and had the last clear chance, by the exercise of reasonable care to avoid such negligence, if any, and failed to do so and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof and the death of the deceased was not proximately caused by such negligence, if any."

III–B.

It was error in the Court to refuse defendant's requested instruction numbered 2B, as follows:

"No. 2B. You are instructed that, even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that at the time of the runaway the defendant railway company was absent and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, or by the exercise of reasonable care might have discovered the same, and had the last clear chance, by the exercise of reasonable care to avoid such negligence, if any, and failed to do so and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof, and the death of the deceased was not proximately caused by such negligence, if any."

III–C.

It was error in the Court to refuse defendant's requested instruction numbered 2C, as follows: [195]

"No. 2C. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place and is no longer present and some one approaches such place and discovers, or by the exercise of reasonable diligence might have discovered the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause and in the occurrence of which its negligence was merely a condition or circumstance."

III–D.

It was error in the Court to refuse defendant's requested instruction numbered 2D, as follows:

"No. 2D. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place and is no longer present and some one approaches such place and discovers the negligence of such defendant and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in

law deemed not a cause of such person being injured by such dangers but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause and in the occurrence of which its negligence was merely a condition or circumstance."

III–E.

It was error in the Court to refuse defendant's requested instruction numbered 3E, as follows:

"No. 3E. Even if you find that the defendant railway company was negligent in any of the matters complained of, nevertheless, you cannot return a verdict for the plaintiffs if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees, knew, or discovered, or in the exercise of reasonable care should have known or discovered said negligence, if any, of said defendant and had the last clear chance to avoid the same and negligently failed to avoid the same. If such is the case, then the negligence, if any, of said defendant is in law but a condition surrounding the accident and not, in law, a proximate cause of the accident, for no one is after discovering or having the means of discovering that another has been negligent entitled to thrust himself upon the negligence of another or blindly refuse to discover the negligence of another and if he does so, it is, in law, his own act or omission and not the negligence of the defendant which is the proximate cause of the injury."

III–F.

It was error in the Court to refuse defendant's requested instruction numbered 3F, as follows:

"No. 3F. If you find from the evidence that the defendant railway company placed or negligently permitted to remain, at the place narrated in the complaint, the carcass of a horse so that it was an object likely to frighten horses driven upon the roadway **[196]** in question, such negligence, if any, on the part of said defendant would not be a proximate cause of the runaway and of the damages, if any, caused by the death of the deceased, if you further find that the deceased, or the plaintiffs, or either of them, his, her or their agents or employees, knew of and discovered said negligence, if any, or by the exercise of reasonable care should have known or discovered the same, or had the last clear chance to avoid the same and negligently failed to do so. Under such circumstances the negligence, if any, of the defendant railway company would be a mere condition or circumstance of the runaway but not a cause thereof."

IV–A.

It was error in the Court to charge the jury as follows:

"Defendant furthermore sets up a plea of contributory negligence, that is to say, it alleges that if it was negligent in and about the situation of this carcass, that when the plaintiffs' driver Bigelow took the wife through that place, he was negligent in his driving, and that this negligence contributed to

the injury, and without it the injury would not have happened.

"Now at this point comes this proposition: The issue in reference to the contributory negligence alleged against the driver Bigelow, and, in reference to that, all the Court has heard in the way of evidence is that Bigelow had been drinking that day.

"Contributory negligence means that a party who is laying a claim against another person for his negligence, was himself lacking in ordinary care due for his own safety. In other words, even though the defendant was negligent in leaving the carcass there, and even though it frightened the team, yet if Bigelow had driven with ordinary care and thus prevented the accident, then his negligence contributed to the injury. Unless you find by a preponderance of the evidence that he did not so drive, why, you put the question of contributory negligence out of sight."

IV–B.

It was error in the Court in its charge to rule that the doctrine of the last chance had no application to this case and to limit the issue of contributory negligence to the method of driving, and to instruct the jury that other matters of contributory negligence, such as the duty of the deceased not to thrust herself upon defendant's negligence, might be laid aside, and not to charge that the deceased had no right to thrust herself upon the negligence of the defendant, as the answer pleads, and the proof shows that whatever dangers existed the deceased and her agents knew of them, or had the last clear chance, by the

exercise of reasonable care, to avoid them.

IV–C.

It was error in the Court to overrule the following exception and objection to the Court's charge: **[197]**

"We except further on the ground that the instructions do not cover all of the issues. Our contention is that no one has a right to thrust himself upon the negligence, if any, of another. The answer specially pleads that, that whatever dangers there were existing, the plaintiffs, or their representative knew, and at least had the last clear chance to avoid it in the exercise of reasonable care; and the proof shows that there were other ways by which the Ennis ranch could be reached, and the instructions do not cover that phase at all.

"Your Honor has limited the issue of contributory negligence to the manner of driving, and has not charged the jury as to the duty of the driver or the plaintiffs in any way to avoid the alleged negligence of the defendant, not only in the manner of driving, but by using another road, or in any other respect. In fact, the Court charges the jury that the last clear chance doctrine as regards the plaintiffs' negligence, and any negligence of the driver, other than his manner of driving, may be laid aside.

"By the COURT.—In the light of the testimony as to the use made of the road, I do not think the driver was bound to use another road; by placing the carcass there you cannot foreclose him from using that road. Your exception will be noted."

V–A.

It was error in the Court to refuse defendant's

requested instruction numbered 4A, as follows:

"No. 4A. You are instructed that the evidence does not show and is legally insufficient to establish that the place where said Nettie Ennis and John Bigelow attempted to drive across the railroad track of the defendant railway company, was anything other than a roadway by invitation of the railway company."

V–B.

It was error in the Court to refuse defendant's requested instruction numbered 4B, as follows:

"No. 4B. The railway company was not, in any event under any absolute duty to remove the carcass in question, if you find that the carcass caused the runaway; it was at least under not more than an alternate duty, that is to say, to exercise reasonable care to remove the carcass or to exercise reasonable care to give warning of the dangers, if any, which might arise from its presence, if you find that such dangers existed. And, in this connection, a knowledge by any person of such dangers, if any, or the fact, if it is a fact, that, in the exercise of reasonable care, such person would know of such dangers, if any, would dispense with any necessity of giving such person warning."

V–C.

It was error in the Court to refuse defendant's requested instruction numbered 4D, as follows:

"No. 4D. You are instructed that under the evidence in this case the defendant railway company was, as regards that portion of the roadway crossing its tracks and on its property, entitled to have there

such articles or objects as it saw fit, provided that it gave warning thereof to persons using the crossing and in the event that any such person knew of the presence [198] thereof, and of the dangers, if any, flowing therefrom, this would dispense with any duty to give warning as to such person, and such person using the crossing with the knowledge aforesaid would do so at his own risk, if any, and defendant could not be liable to him for damages, if any, thereby sustained."

VI–A.

It was error in the Court to charge the jury as follows:

"In this case it appears that there was a traveled way along the railroad track, across the railroad track; that it was generally treated in the community as a public highway; that the people who had occasion to travel that way used it; that the county authorities treated it as a highway, maintained it as such, and at the point where it crosses the railroad track, the railway company had planked the way, making it easier to cross, and they had put up cattle-guards, as is customary, on each side of the railroad, and these cattle-guards had run out to the side fences, the same as on highways. The Court will say to you that while this was not a legal highway, in that it had not been laid out by the county, with all the requirements of the law, as it is agreed, by the authorities, yet to all intents and purposes, this was a public highway, and imposed upon the defendant the same duties in relation to it that would be imposed upon it in connection with a legal highway,

and conferrred upon the plaintiffs, and the deceased woman, the wife of Herbert L. Ennis, the same rights to travel that she would have to travel on any public highway."

VI–B.

It was error in the Court to instruct the jury that the way in question was treated by all parties as a public highway, and not to define the measure of responsibility in the event that the jury should find that the way in question was merely a way by invitation.

VII–A.

It was error in the Court to charge the jury as follows:

"Briefly the issues in this case are: Is the defendant responsible at all for the placing of this carcass at the place where the evidence shows it was? In brief, it might be, did the defendant's railway train kill and throw this carcass in that position along this roadway? If that issue is determined against the defendant, then the next question would be, whether or not, in so allowing it to remain there, the defendant was negligent."

"In this case, if you find that the defendant had killed this horse by one of its trains, and threw it down below the traveled part of this sixty-foot highway across its line, and left it there from January or December, until April, and that when April came, on the day when this lady was crossing there, the appearance of the carcass, and the odors from it were such as tended to frighten the ordinary teams that would pass over the highway, and teams of or-

dinary gentleness and training, why, you would be justified in finding that the defendant was negligent in leaving the carcass there, under those circumstances."

VII–B.

It was error in the Court to instruct the jury that the **[199]** railway company placed the carcass near the roadway, if the horse was killed by being struck by a train and thrown there, irrespective of whether or not the railway company was negligent in the operation of the train, and without proof of any act of the railway company justifying the submission of such an issue as to the placing of the carcass.

VII–C.

It was error in the Court to overrule the following objection and exception to the Court's charge, to wit:

"In regard to the placing of the carcass, your Honor has instructed the jury that, if the carcass was placed there by being struck by a train that would consist of the act of placing the carcass. We except on the ground that the act of placing the carcass has not been proven, and there is no proof of such a fact. We also except on the ground that we should not be liable for the placing of the animal unless we were negligent in the placing in the first place; that is, unless it amounts to negligence in the operation of the train that struck it."

VII–D.

It was error in the Court to instruct the jury, as follows:

"The test will be whether a man of average common sense would know that it would have a tendency to frighten animals at that place. And if it would, if the average reasonable man would know it, then the defendant company would be taken to know it.

"Of course, if it is an unusual circumstance, something that no reasonable man would expect to follow from leaving the carcass there, that is a different proposition. The defendant would not be liable; but it is left to your sound sense and judgment to say whether or not in that condition at that time and place and under the circumstances of the road crossing, whether or not the average reasonable man would know that this was a dangerous object, as I have defined it; if so, the railroad company would be liable, otherwise not."

VII–E.

It was error in the Court to overrule the following objection and exception to the Court's charge in Assignment VII–D above:

"The Court instructed the jury that if the carcass had that tendency to frighten animals, the railroad company would have been negligent. We contend that the jury should have been instructed that it would be also necessary for the plaintiffs to establish that the railway company knew of this tendency, or, in the exercise of reasonable care, should have known of it. Your Honor has said that that would be the fact, whether or not the railroad company should have known of the condition there. Your Honor should charge, in addition to what your

Honor has said, that the railway company would not be negligent unless *in its situation it knew, or should have known,* of the alleged fact as to the tendency of the carcass." **[200]**

VIII–A.

It was error in the Court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (the plaintiff in the case) that he knew that the driver Bigelow, prior to the accident, was a man given to the use of intoxicating liquors to excess."

VIII–B.

It was error in the Court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (William Gardner) that the driver Bigelow was at all times prior to the accident addicted to the habitual and excessive use of intoxicating liquors, and was, to the knowledge of the witness, usually under the influence of excessive use of liquor, sufficient to make dull his senses whenever, prior to the accident, he came to Bainville at any time prior thereto six months before the accident."

VIII–C.

It was error in the Court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (Charles Hubener) that for about a year previous to Bigelow's starting to work for Dr. Ennis, Bigelow was working for the witness in the saloon business as a bartender; that witness offered during the said period to give Bigelow a share in the

business if he would keep sober and not get intoxicated, but that Bigelow was nearly always during said period so intoxicated that he could not attend to the business, and finally the witness discharged him because the witness had observed that he was an habitual drunkard."

IX–A.

It was error in the Court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (Charles Hubener) that shortly after the accident, the witness was talking with Bigelow about the accident, and that Bigelow then told him that it was a piece of paper that caused the horses to run away, and not the carcass referred to in the testimony."

IX–B.

It was error in the Court to deny the defendant the right to withdraw its disclaimer of any intention to impeach the witness Bigelow and to permit the plaintiffs to read into the evidence the following question propounded to, and the following answer given by, the witness Bigelow: **[201]**

"Q. Did you ever, at any time or at any place, make any statement to anyone to the effect that this runaway had been caused by the horses becoming frightened at a piece of paper and not by the carcass?"

"A. No, sir."

IX–C.

It was error in the Court to overrule the following objection to the admission of the testimony of the

witness Bigelow on the former trial, and to admit said testimony:

"We object to the admission of the testimony of the witness Bigelow, taken on the former trial, because the transcript of his testimony constitutes mere hearsay, and the witness Bigelow himself must be called, and the inability to call him has not been sufficiently established, and because at the time Bigelow was examined at the time of the last trial, we did not have impeaching testimony, and we examined him at the last trial for the purpose of ascertaining if there was any impeaching testimony available, but since then we have secured impeaching testimony, and because also the transcript of his testimony is too uncertain to be intelligible, in that the witness referred to a plat and designated places upon a plat by such expressions as 'here' or 'there,' without marking the same on the plat or indicating in his testimony where the same were."

X–A.

It was error in the Court to permit the cross-examination of the witness, Mrs. Charles Allison, shown in her deposition, to be read in evidence, defendant having waived it, and to overrule the following objection thereto:

"We object to the cross-examination of the witness, Mrs. Charles Allison being read in the evidence, because we have waived the same, and under the stipulation we have the right to waive the same, and thereupon it ceases to be cross-examination."

X–B.

It was error in the Court to permit the plaintiffs

to read in evidence the following questions and answers in cross-examination:

"Q. Did Mrs. Ennis say anything to you at that time about his having had any liquor, or anything like that?"

"A. No, she did not."

"Q. Did she say anything after the accident about him having had any liquor?"

"A. No, sir."

"To which questions and answers the defendant objected, on the ground that it had waived the cross-examination, and therefore none of the cross-examination should be read in evidence, and in so far as the same is admitted as cross-examiation, it is a cross-examination as to a matter concerning which the defendant was forced to enter, by reason of the improper questions asked in the **[202]** direct examination, in regard to the declaration of Mrs Ennis, there being, at the time the deposition was taken, no one present who could rule on the competency of said testimony, and said questions in cross-examination were asked merely for the purpose of developing anything that is pretended to have been said by Mrs. Ennis, we thus seeking to sound the reliability of the witness' testimony as regards the alleged conversation, and the same is hearsay, incompetent and irrelevant."

X–C.

It was error in the Court to permit the plaintiffs to read in evidence the following question and answer in cross-examination and to overrule defendant's objection thereto, as follows:

"Q. Is there any discussion you heard around Bainville as to Mr. Bigelow being responsible for the accident?"

"A. No, sir; I have never heard a great deal said about it."

To which question and answer defendant objected for the reason set forth in Assignment X–A.

X–D.

It was error in the Court to permit the plaintiffs to read in evidence the following question and answer in the cross-examination of the witness Mrs. Charles Allison, and to overrule defendant's objection thereto, as follows:

"Q. And during those conversations did she say anything about Mr. Bigelow having been drinking that day?"

Which said question was objected to for the reason set forth in the Assignment X–B.

"A. No, sir, she did not."

X–E.

It was error in the Court to permit the plaintiffs to read in evidence the following question and answer in cross-examination:

"Q. Have you heard any of these people, whose names you mentioned to us, refer to Mr. Bigelow as in any way responsible for the accident?"

"A. No, sir."

"To which question and answer the defendant objected, for the reason set forth in Assignment X–A."

X–F.

It was error in the Court to permit the plaintiffs to read in evidence the recross-examination of the

witness, Mrs. Charles Allison, **[203]** for the reasons hereinbefore stated, and for the reason that the witness was cross-examined for the purpose of testing her knowledge as to matters testified to by her, there being no one present to rule upon the competency of her testimony.

XI.

It was error in the Court to sustain the following objection to the following question, and to overrule the following offer of proof:

"Q. Were you in attendance at the last trial as a witness for the plaintiffs?"

By the PLAINTIFFS.—We object to that as wholly immaterial.

By the DEFENDANT.—We offer to prove that at the last trial the witness was present and was called as a witness for the plaintiffs."

XII–A.

In the trial there were irregularities in the proceedings of the Court and abuse of discretion on the part of the Court, by which the defendant was prevented from having a fair trial.

XII–B.

The Court was guilty of irregularities in the course of the trial, by which the defendant was prevented from having a fair trial.

XII–C.

The Court abused its discretion in the course of the trial, whereby defendant was prevented from having a fair trial.

XII–D.

The Court was guilty of irregularities and abused

its discretion in the course of the trial, whereby the defendant was prevented from having a fair trial, as follows:

1. On the matters resting generally and as separate rulings in the discretion of the Court, and on matters not of themselves separately assignable as errors the Court ruled so frequently adversely to the defendant that, though such rulings, as separate rulings, are not assignable as errors, the defendant was, by the number thereof, unduly hampered in the examination of witnesses and prejudiced in the eyes of the jury.

2. The Court unduly, unnecessarily, improperly, frequently and without justification, restricted defendant in the examination of witnesses and prevented defendant from fully presenting the testimony favorable to the defendant, and material, competent and relevant to its defenses. **[204]**

3. The Court unwittingly ridiculed before the jury defendant's defense that the driver Bigelow, refered to in the testimony, was under the influence of intoxicating liquor at the times complained of; the defense that the carcass did not give forth odor, and did not cause the runaway; the defense that the driver Bigelow had the last clear chance to avoid defendant's negligence, if any, and every defense interposed by defendant by statements made by the Court in the trial, first excluding testimony in support of these defenses, and by afterwards permitting some of such testimony to be received, accompanied by comments by the Court, adverse to such testimony, and otherwise causing the jury to believe that the

defendant's competent, material and relevant testimony was not such, and was admitted merely by the indulgence of the Court, and ought not and would not be considered by the jury, as affecting the case.

4. The Court in the trial permitted itself to assume, or appear to assume, a repeatedly harsh, hostile and prejudiced manner towards defendant, its witnesses and its counsel, whereby defendant was hampered in the examination of witnesses and prejudiced in the eyes of the jury.

5. In other respects, the Court was guilty of irregularities, and of abuse of discretion.

XIII–A.

The damages as fixed by the verdict of the jury are excessive, and appear to have been given under the influence of passion and prejudice.

XIII–B.

The evidence is insufficient to justify the verdict in the item of damages.

XIII–C.

It was error in the Court to rule that the re-marriage of the plaintiff immediately after the trial could not be considered by the jury in determining the excessiveness of the verdict.

WHEREFORE the defendant prays that said petition for a writ of error be granted, and that, for the reasons aforesaid and for divers and sundry other reasons, the judgment entered herein on the 2d day of July, 1914, the same also having been suspended by the filing of defendant's petition for a new trial on the 8th day of August, 1914, and re-entered by the order denying the defendant a new trial made

and entered herein on the 14th day of January, 1915, be reversed.

Filed Mar. 10, 1915. Geo. W. Sproule, Clerk.

VEAZEY & VEAZEY,

Attorneys for Defendant, Great Northern Railway Company, Plaintiff in Error. [205]

Thereafter, on March 10, 1915, Petition for Writ of Error was filed herein, as follows, to wit: [206]

In the District Court of the United States in and for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Petition for Writ of Error.

Great Northern Railway Company, the defendant in the above-entitled cause, conceiving itself aggrieved by the judgment rendered in the District Court of the United States, in and for the District of Montana, in said cause on the 2d day of July, A. D. 1914 (being the final and only judgment entered in said cause), and complaining that in the record and proceedings had in said cause, and also in the rendition of said judgment, manifest error hath happened, to the great damage of said defendant, as more fully appears from the Assignment of Errors, which is filed with this petition, comes now and petitions the

above-entitled court for an order allowing said defendant to prosecute a Writ of Error out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that such Writ of Error may issue in this behalf out of said Circuit Court of Appeals, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and also that an order may be made fixing the amount of security which said defendant shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals, and for such other and further order as to the Court may seem just.

Great Falls, Montana, March 10, 1915.

VEAZEY & VEAZEY,
Attorneys for Defendant.

Filed Mar. 10, 1915. Geo. W. Sproule, Clerk.

[207]

Thereafter, on May 10, 1915, Bond on Writ of Error was duly filed herein, being in the words and figures following, to wit: [208]

In the District Court of the United States in and for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That Great Northern Railway Company, by Veazey & Veazey, its attorneys, as principal, and National Surety Company, a corporation, duly organized and incorporated under the laws of the State of New York, (with the capital and assets provided for in an act of the Sixth Legislative Assembly of the State of Montana entitled "An act to Permit Foreign Surety Companies to do Business in this State and Regulating the Method Thereof," for the purpose, among other things, of transacting business as a surety on undertakings of persons and corporations, and the acts supplemental thereto or amendatory thereof, which said corporation has complied with all the provisions of said act and acts), as surety, are held and firmly bound unto Herbert L. Ennis and Guy W. Ennis, the plaintiffs in the above-entitled cause, their executors, administrators and assigns, in the penal sum of Eleven Thousand ($11,000.00) Dollars, for the payment of which amount well and

truly to be made to the said plaintiffs, their executors, administrators and assigns, the said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly, by these presents.

Dated this 10th day of March, A. D. 1915.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:

WHEREAS, the above-named Great Northern Railway Company has prosecuted, or is about to prosecute, a Writ of Error out of the United States Circuit Court of Appeals for the Ninth Circuit to have reviewed by said United States Circuit Court of Appeals, and to reverse the [209] judgment in the above-entitled cause rendered and entered by the United States District Court for the District of Montana on the 2d day of July, A. D. 1914, in favor of the plaintiffs and against the defendant, Great Northern Railway Company.

NOW, THEREFORE, if the above-named Great Northern Railway Company, defendant in said cause and plaintiff in error, shall prosecute its said Writ of Error to effect and answer all damages and costs if it should fail to make its plea good, then this obligation shall be void, otherwise it shall remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY,

By VEAZEY & VEAZEY,

Its Attorneys.

NATIONAL SURETY COMPANY,

[Corporate Seal] By W. S. FRARY,

Its Duly Authorized Attorney in Fact.

The foregoing bond is hereby approved as to form and sufficiency and in all things, this 10th day of March, A. D. 1915.

BOURQUIN,

United States District Judge for the District of Montana.

Filed Mar. 10, 1915. Geo. W. Sproule, Clerk. [210]

Thereafter, on March 10, 1915, an Order Allowing Writ of Error was duly entered herein, as follows, to wit: [211]

In the District Court of the United States in and for the District of Montana.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et al.,

Defendants.

Order Allowing Writ of Error.

At a stated term, to wit, the November term, A. D. 1914, of the District Court of the United States in and for the District of Montana, held at the city of Helena, in the State and District of Montana, on the 10th day of March, A. D. 1915.

Present, the Hon. GEORGE M. BOURQUIN, District Judge.

This day came the defendant, Great Northern Railway Company, by its attorneys, and filed herein

and presented to the Court, and its judge, the petition of said defendant praying for the allowance of a Writ of Error out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and an Assignment of Errors setting forth the errors intended to be urged by said defendant, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow said Writ of Error, and it is ordered that a Writ of Error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered and entered herein on the 2d day of July, A. D. 1914, being a day of the April term of said District Court, and that the amount of bond on said Writ of Error be and hereby is fixed at the sum of Ten Thousand Dollars, which said bond shall operate as [212] a supersedeas bond, and that upon said defendant, Great Northern Railway Company, plaintiff in error, filing with the clerk of this court a good and sufficient bond in the said sum of Ten Thousand Dollars, approved by this Court, or its judge, execution on said judgment shall be, and hereby is, stayed and all further proceedings in this Court shall be, and they hereby are, suspended and stayed until the determination of said Writ of Error by said United

States Circuit Court of Appeals.

Done in open court this 10th day of March, A. D. 1915, and ordered entered as above.

GEO. M. BOURQUIN,
United States District Judge for the District of Montana.

Filed and entered March 10, 1915. Geo. W. Sproule, Clerk. [213]

Thereafter, on March 10, 1915, a Writ of Error was issued herein, which Writ of Error is hereto annexed, and is in the words and figures following, to wit: [214]

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable the District Court of the United States, for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said District Court before you, or some of you, between Herbert L. Ennis and Guy W. Ennis, defendants in error and plaintiffs in said District Court, and Great Northern Railway Company, plaintiff in error and defendant in said District Court, manifest error hath happened to the great damage of said defendant, and plaintiff in error, Great Northern Railway Company, as by its petition and Assignment of Errors appears, we, being willing that error, if any

there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this Writ, in said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, and the seal of the District Court of the United States [215] for the District of Montana, this 10th day of March, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States the one hundred and thirty-ninth.

[Seal] GEO. W. SPOULE,
Clerk of the United States District Court for the District of Montana.

Due personal service of the foregoing Writ of Error made and admitted and receipt of copy acknowledged this 15th day of March, A. D. 1915.

WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs in said District Court and Defendants in Error.

Copy lodged for Plaintiffs this 10th day of March, A. D. 1915.

GEO. W. SPROULE,
Clerk of said United States District Court. [216]

Answer of Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk. [217]

[Endorsed]: No. 960. In the District Court of the United States in and for the District of Montana. Herbert L. Ennis et al., Plaintiffs, vs. G. N. Ry. Co., Defendant. Writ of Error. Filed March 17, 1915. Geo. W. Sproule, Clerk. [218]

Thereafter, on March 10, 1915, a Citation was duly issued herein, which Citation is hereto annexed, and is in the words and figures following, to wit: [219]

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

Citation on Writ of Error

UNITED STATES OF AMERICA,—ss.

The President of the United States, to HERBERT L. ENNIS and GUY W. ENNIS, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, and at a session thereof, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein Great Northern Railway Company, defendant in said District Court, is plaintiff in error, and you, the said Herbert L. Ennis and Guy W. Ennis, plaintiffs in said District Court, are defendants in error, to show cause, if any there be, why the judgment rendered against said defendant, plaintiff in error, and in favor of said plaintiffs, defendants in error, in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. GEORGE M. BOURQUIN, United States District Judge, for the District of Montana, this 10th day of March, A. D. 1915.

BOURQUIN,
United States District Judge for the District of Montana.

Due personal service of the foregoing Citation made and admitted and receipt of copy acknowledged this 15th day of March, A. D. 1915.

WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs in said District Court and Defendants in Error. [220]

[Endorsed]: No. 960. In the District Court of the United States in and for the District of Montana. Herbert L. Ennis et al., Plaintiffs, vs. G. N. Ry. Co., Defendant. Citation on Writ of Error. Filed March 17, 1915. Geo. W. Sproule, Clerk. [221]

Thereafter, on March 19, 1915, an Order as to exhibits was made and entered herein, as follows, to wit:

In the District Court of the United States in and for the District of Montana.

HERBERT L. ENNIS et al.,
Plaintiffs,
vs.
GREAT NORTHERN RAILWAY CO. et al.,
Defendants.

Order Directing Transmission of Original Exhibits.

It appearing to the undersigned, the presiding

Judge of the above-entitled court, presiding in the above-entitled cause at the trial thereof, that it is proper that the original exhibits used on the trial of the above-entitled cause, or referred to in the bill of exceptions herein to the rulings made and proceedings had on said trial, should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, upon the writ of error sued out by the above-named defendant to have reviewed the judgment of the above-entitled court by the said Circuit Court of Appeals;

On motion of counsel for defendant Great Northern Railway Company, and pursuant to stipulation,

It is ordered that the clerk of the above-entitled court transmit to said Circuit Court of Appeals the said original exhibits introduced in evidence, consisting of all photographs offered and received in evidence on the trial of the above-entitled cause, and of a plat or sketch of the location of the accident referred to in the complaint, so that said clerk may have the same in the said Circuit Court of Appeals with the transcript of the record in this cause.

Dated March 19, 1915.

GEO. M. BOURQUIN,
District Judge.

Filed and entered March 19, 1915. Geo. W. Sproule, Clerk. [222]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 223 pages, numbered consecutively from 1 to 223, inclusive, is a full, true and correct transcript of the original Amended Complaint, Second Amended Complaint, Demurrer to Second Amended Complaint, Order overruling Demurrer, Answer to Second Amended Complaint, Reply, Verdict, Judgment, Bill of Exceptions to order allowing amendment to original complaint, which contains a copy of the original complaint, Bill of Exceptions on motion to strike amended complaint, Bill of Exceptions on motion to strike second amended complaint, Bill of Exceptions to rulings made at trial, Assignment of Errors, Petition for Writ of Error, Bond, Order Allowing Writ, and Order as to Exhibits, now remaining on file and of record in my office as such clerk; and I further certify that I have annexed to said transcript and included within said paging the original Writ of Error and Citation issued in said cause, and that I transmit herewith the original exhibits referred to in the above-mentioned order.

I further certify that the costs of the transcript of record herein amount to the sum of Thirty-three

50/100 Dollars ($33 50/100), and have been paid by plaintiff in error.

In Witness whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 27th day of March, A. D. 1915.

[Seal] GEO. W. SPROULE,
Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 3/27/1915. G. W. S.] **[223]**

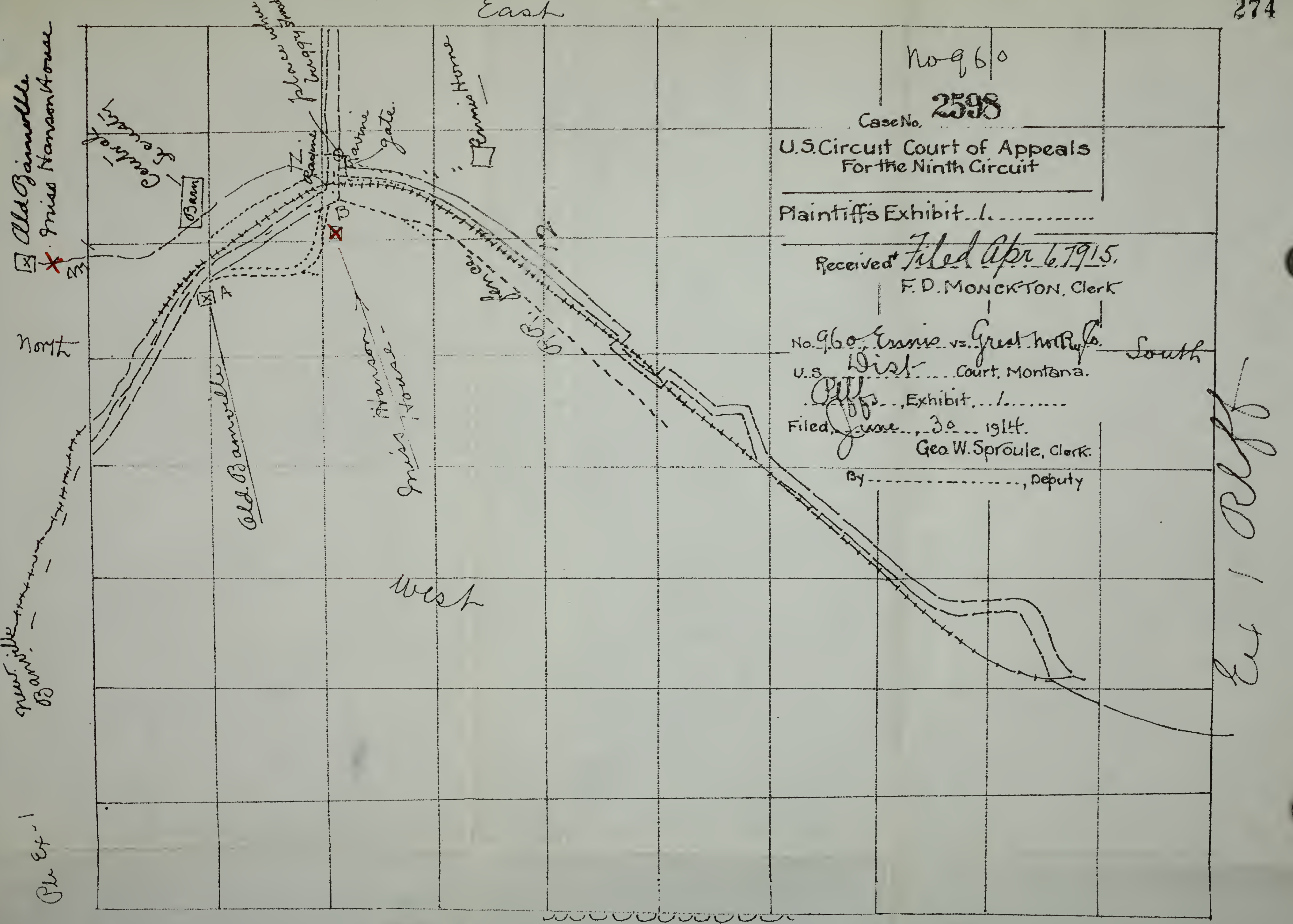
[Endorsed]: No. 2598. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Plaintiff in Error, vs. Herbert L. Ennis and Guy W. Ennis, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed April 6, 1915.

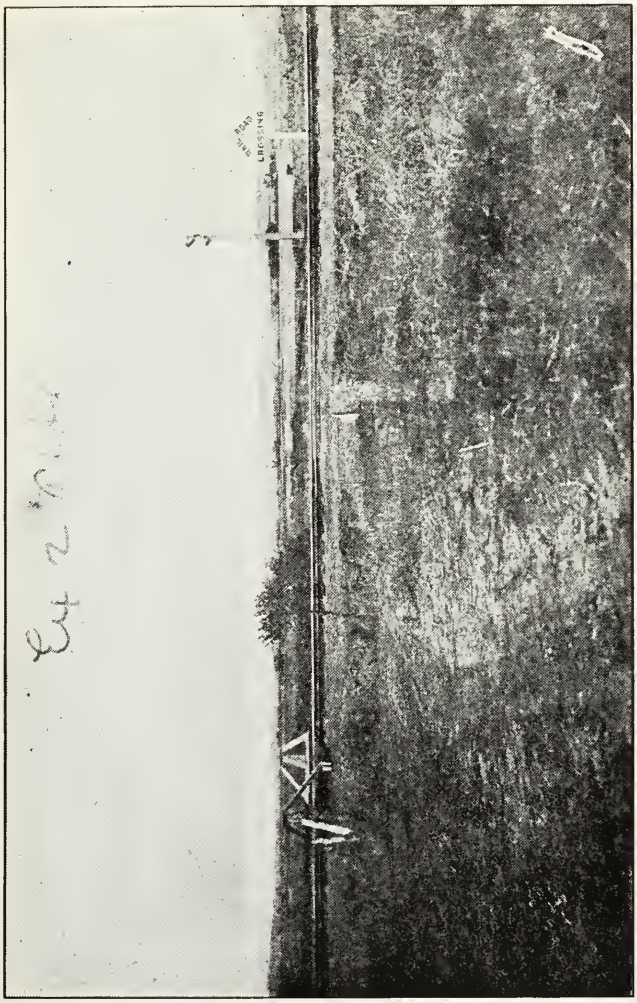
FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[PLAINTIFFS EXHIBIT 1.]



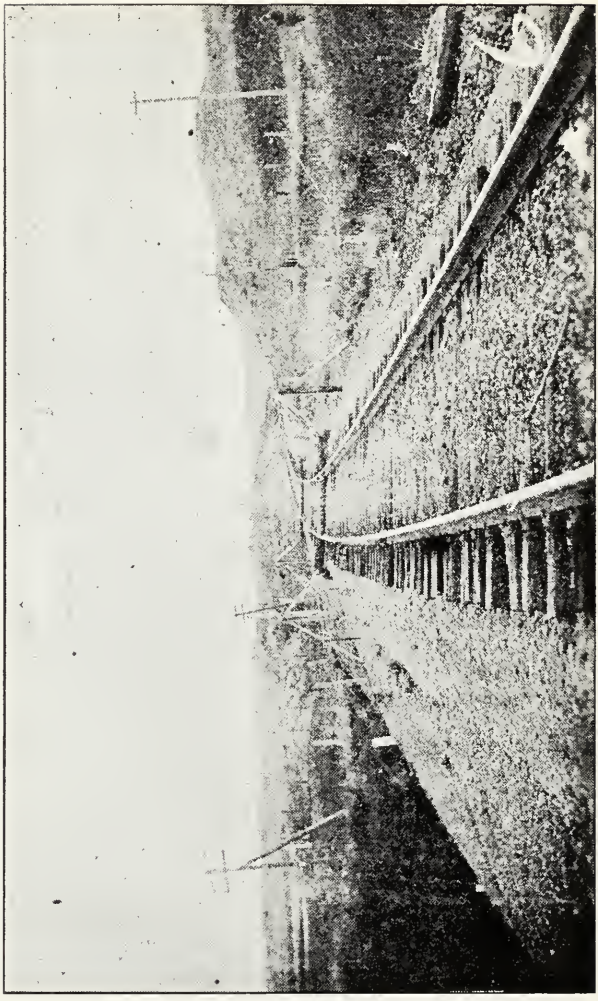
Plaintiffs' Exhibit No. 2.



[Endorsed]: No. 960. Ennis vs. Great Nor. Ry. Co. U. S. District Court, Montana. Plffs'. Exhibit 2. Filed June 30, 1914. Geo. W. Sproule, Clerk. By ————, Deputy.

No. 2598. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 2. Received and filed Apr. 6, 1915. F. D. Monckton, Clerk.

Plaintiffs' Exhibit No. 3.



[Endorsed]: No. 960. Ennis vs. Great Nor. Ry. Co. U. S. District Court, Montana. Plffs'. Exhibit 3. Filed June 30, 1914. Geo. W. Sproule, Clerk. By ————, Deputy.

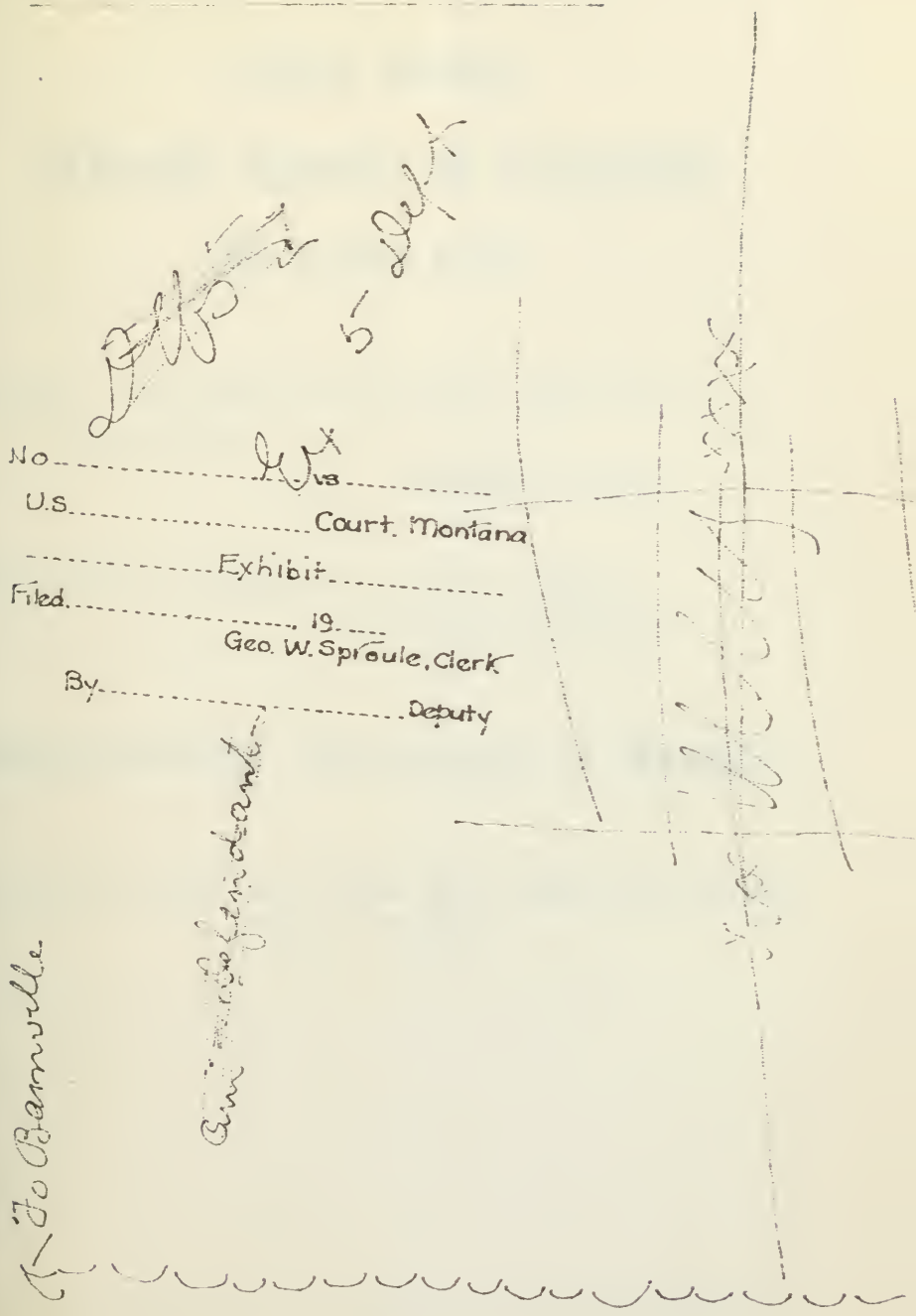
No. 2598. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 3. Received and filed Apr. 6, 1915. F. D. Monckton Clerk.

Plaintiffs' Exhibit No. 4.

[Endorsed]: No. 960. Ennis vs. Great Nor. Ry. Co. U. S. District Court, Montana. Plffs'. Exhibit 4. Filed June 30, 1914. Geo. W. Sproule, Clerk. By ————, Deputy.

No. 2598. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 4. Received and filed Apr. 6, 1915. F. D. Monckton, Clerk.

DEFENDANT'S EXHIBIT 5.



No. ..... Vs. .....

U.S. ..... Court. Montana

..... Exhibit .....

Filed. ..... 19. ....

Geo. W. Sproule, Clerk

By ..... Deputy